



**GARSWELL & CO**  
TORONTO, ONT.  
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PUBLISHERS, EDINBURGH,  
DEALERS AND SCOTLAND.  
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THE  
UPPER CANADA JURIST:

CONTAINING

SOME IMPORTANT DECISIONS IN BANKRUPTCY  
AND CHANCERY IN UPPER CANADA;

ALSO

KING'S BENCH & PRACTICE COURT REPORTS

(OLD SERIES),

INCLUDING THE CASES DETERMINED FROM  
TRINITY TERM, 1 & 2 WILL. IV., TO TRINITY TERM, 2 & 3 WILL. IV.,  
WITH A TABLE OF THE NAMES OF CASES ARGUED, AND  
DIGEST OF THE PRINCIPAL MATTERS.

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1846-8.

VOL. II. Q. B. O. S.

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SECOND EDITION.

TORONTO:

R. CARSWELL.

1877.

## DIRECTIONS TO THE BINDER.

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In consequence of an alteration in the plan of this publication, the paging of the Upper Canada Reports, Old Series, is continued throughout the two years, while the paging of the Reports in Bankruptcy and in the Executive Council re-commences with page 1 in the number for June, 1847. Subscribers wishing to bind up the whole in one volume, will find it most convenient to place the latter series at the end of the volume.

The Number for September, 1846, having been issued out of its turn for a special object, has occasioned an error in the paging, by which the pages from 129 to 162 are repeated twice over.

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\* \* The above indicated errors have been corrected in this edition, and new paging made to run correctly throughout ; but to meet references from digests and other citations to first edition, the old paging is preserved at the foot of each page, followed by the letter A, B or C.

A new Index and Table of Cases have been prepared referring also to both pagings.

It is hoped these improvements, with the entire reprint of the first edition, will meet the approval of the profession.

PUBLISHER.

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# THE UPPER CANADA JURIST.

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IN CHANCERY.

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25TH JANUARY, 1844

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CLARKE v. MANNERS.

Injunction being prayed for in the prayer for process is sufficient.

In this case an injunction had issued, on affidavits, restraining defendant from issuing execution upon an award made in an action at law, on the ground of improper conduct of arbitrators, &c., set forth in affidavits, and stated in bill filed. On a former day,

*Esten*, for defendant, moved to set aside injunction for irregularity, on the ground that it was not prayed for in the prayer for relief, but only in the prayer for process; and as authority for his motion, quoted Smith's Chancery Practice, 587, *Wood v. Beadell*, 3 Sim. 273.

*Burns*, in support of injunction, contended that *Wood v. Beadell* would not bear the defendant's counsel out in his view of the present case; that having been a motion made by plaintiff to amend his bill by inserting the prayer for injunction in the prayer for process; that the object for inserting the prayer at all, is to give the party notice of what was asked as he might thus be induced to make a different case by his answer than he would if he had not this notice; and that it being asked for in the prayer for process, answered that end as well as if it had been prayed for twice over; that inserting the prayer twice, was an unnecessary repetition of words.

This day the Vice-Chancellor refused the motion. It being sufficient to pray for the injunction in the prayer for process.

*Costs to be costs in the cause.*

1ST FEBRUARY, 1844.

(IN REVIEW.)

## IN RE MALCOLM GILLESPIE, AN ALLEGED BANKRUPT.

Act of bankruptcy must be stated in affidavits filed with judge.

This was a petition presented to the Vice-Chancellor, to supersede a commission of bankruptcy, issued in the Home District, by J. Powell, Esq., Judge District Court, under the Bankrupt Act, 7 Vic. ch. 10.

*Hagarty*, in support of the petition, objects that on the proceedings had in the court below, there was nothing shewn to warrant the judge in issuing a commission; the affidavits do not contain sufficient proof of any act of bankruptcy; there being no fiat or striking of a docket in this country, the affidavits made to ground motion before the judge should be as clear, and contain as satisfactory evidence, as in England is required before the commissioners at the opening of the fiat.

The affidavits here state that cognovits had been given, and bankrupt "procured his goods to be taken in execution;" following thus far the words of the statute, instead of stating facts and dates to enable the judge to decide as to the propriety of issuing commission.—(Exp. Smith, 1 Rose, 147; Arch. P. Bky. 213.)

*Baldwin*, contra.—There is no adjudication here from which to appeal. The act under which this proceeding has been had, requires only two instead of three sittings, as in England. In England the bankrupt may (although he usually does not) attend before the commissioners and shew cause against sealing a commission; here it is not so, the proceeding from its very nature being ex-parte, there is no adjudication properly so called. The motion ought to have been made to the court below, and then if decided against the petitioner, there would be an adjudication from which an appeal could be made.—Arch'd. 350; Exp. Baley, 2 Mon. & Ayr. 36.) The question is not if the first steps taken be correct, but rather has the



party committed an act of bankruptcy : for if at the time of shewing cause a subsequent act can be shewn, the commission will not be superseded.

Two questions arise in this case.

1st, Is this the proper court to apply to ?

2nd, If it is, then can a subsequent act of bankruptcy not be shewn. That it can, the learned counsel quoted Exp. Dufresne, 1 V. & B. 51.

(Here the counsel desired to read affidavits to shew other acts of bankruptcy—objected to, not having been filed—one affidavit was made by the bankrupt, and another by Mr. A. Morrison, attorney, stating that he went to jail to witness execution of cognovit.)

*Blake*, for petitioner.—The affidavit required in England in support of commission, is much stronger than the affidavit made on issuing the commission in this case.

That the first step taken by the judge, viz., issuing commission, and publishing the defendant in the Gazette, is a complete adjudication that he is a bankrupt—appeal therefore properly brought. At all events it must be an “order,” as mentioned in the 68th clause of the act.

It is no act of bankruptcy to give a confession ; it is not so in England, nor does the act here make it so ; but the procuring the goods to be seized, that is *voluntarily* procuring the goods to be seized ; the seizure of a party's goods on execution, issued upon a confession, if confession given bona fide, is not a *procuring* them to be seized.

One of the affidavits filed at the time of issuing commission, states, “according to belief,” &c.; but surely the statute requiring act of bankruptcy, to be proved by a person not a creditor, must mean more than a party making oath to a belief ; nor does either of the affidavits state that giving the confession was a voluntary act ; the creditor of a party has a right to obtain what security he can from his debtor, but that is not a voluntary act on the part of the debtor. As to voluntary acts, see 2 Camp. 168 ; 11 E. 240.

*Commission superseded, with costs, against petitioning creditor.*

2ND FEBRUARY, 1844.

## CLARKE V. MANNERS.

On issuing injunction to stay proceedings at common law—money found due by verdict or award, must be paid into court.

*Esten*, for defendant, moves for an order, directing plaintiff to pay the money found due by an award made between the parties, into court, or in default thereof, injunction to be dissolved.

An inflexible rule in England is, that money must be paid into court before an injunction will be granted, after verdict or award.

The time that elapses in England before a verdict can be recovered, is so long, that as a general rule, no special injunction is granted, and therefore the great difficulty in producing cases to support his view of the case. When the common injunction has been obtained for want of answer, the invariable rule is, not to continue it after answer is put in, if by the answer there appears to be money due, nor to grant it, if not previously obtained, without complying with the terms of paying money into court.

If this injunction be continued the plaintiff in this action may before the hearing, make away with all his property, so as to prevent defendant in his action at law from recovering the amount of his judgment [here *Esten* was stopped by the court.]

*Burns*, contra—It is discretionary with the court, either to grant the injunction on the terms of paying money into court or not. The present motion is grounded merely on the fact of there being an award in favour of the defendant; but the defendant ought to go a step further. The common injunction when obtained for want of answer, stays proceedings at law; the defendant having answered, may then move to dissolve, or pay money into court. The answer must, however, displace the equity made by the bill, before the motion would be granted; if motion made before answer put in, then the defendant must move on an affidavit rebutting the equity.

The plaintiff by his bill has shewn sufficient equity for an injunction, and also by his affidavit; as it is stated in both that the award is fraudulent, therefore the court will not interfere unless the equity is displaced—(3 Dan. 292 et seq.) The defendant moving against an injunction must either file an affidavit on which to ground his motion, or put in his answer, otherwise he must rely on the case made by the plaintiff.

More than sufficient time has now elapsed since appearance entered, to entitle plaintiff to common injunction, in which case defendant would be obliged to put in his answer before he could be heard. Why has the defendant not answered? Does it not look as though he were afraid to do so? The defendant should either answer or make affidavit displacing the equity made by the bill, and then he would be in a position to make this motion.

*Esten*, in reply.—The motion is either regular or it is not; if regular, then it is no objection to the order being granted for the plaintiff to say—"defendant has not answered or made "an affidavit."

There is certainly a discretion left with the court, either to grant the injunction with or without the condition, but it is not an *unlimited* one; for in no case (like the present) is it granted in England without this condition.

The plaintiff here does not stand in as good a position as if answer filed, confessing the equity of the bill, as the injunction in this case was granted merely on the plaintiff's affidavit, which may, for all we know now, be either true or false; therefore the court, upon the equity made by the bill and affidavit, will grant an injunction, to prevent irreparable injury, but in order to preserve the subject matter in dispute will order the money into court.

The common injunction when granted for want of answer, the defendant being then in contempt, is granted unconditionally.

I am perfectly willing to make this motion on the facts stated in the bill and affidavit of the plaintiff; true it is they shew good grounds for granting an injunction, but an award

having been made in favour of the defendant, the court will not treat that as a fraudulent award on the plaintiff's statement, and will therefore grant injunction only on condition of paying money into court.

If the defendant can by his answer or affidavit displace the equity made by the plaintiff's bill, no man would then move for money to be paid into court. The motion in that case would be to dissolve the injunction; and even where by the defendant's answer or affidavits the equity is still shewn in favour of the injunction being continued, the court will in such case order money to be paid into court, where there has been an award or verdict.

In England, defendants in actions at law were in the habit of filling bills against a plaintiff who was abroad, depending on getting common injunction for want of answer; but the court finding that such proceedings were frequently made a means of gross injustice, allow the plaintiff (at law) to move for money to be paid into court, on affidavit even before answer.

If the motion for injunction had originally been made on notice, and the defendant had appeared and insisted on the condition of paying money into court, the injunction would have been granted on such terms only.—(1 Bro.101; 2 Bro.14.)

February 5th, 1844.

This day the VICE CHANCELLOR gave judgment in favour of the defendant, on motion to pay money into court, without costs.

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8TH FEBRUARY, 1844.

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BREWER V. ROSE.

Party becoming bankrupt will not prevent his being arrested for contempt in not obeying order of this court.

At a former sitting of the court an order had been obtained by the plaintiff, directing the defendant to pay a sum of money [admitted by his answer to be due to the plaintiff] into court, or to give security to abide decree, or in default, &c.



*Burns* now moves to stay the order so issued, on the ground that the defendant had become a bankrupt; and proposes substituting security not to leave the province; he had only to urge his case to the equity of the court, the defendant being now unable to comply with the order. The statute 7 Vic. ch. 10, sec. 25, having taken all his effects out of his hands, and placed them in the custody of the sheriff, he is thereby rendered unable to pay; and a person in such a situation is not likely to obtain security such as is required by the order, although he may be able to obtain security not to leave the country.

*Esten*, contra,— Would first call attention to the point that it is not shewn that the demand in this cause is provable under the commission; and next, to the fact of the defendant being in a position to make the present application, being placed in such position by his own default; for, had the order of this court been obeyed, the money would have been paid in before the issuing of the commission of bankruptcy; not having done so, the defendant is now in contempt.

Again, the mere fact of a commission of bankruptcy having issued, is no bar to the plaintiff proceeding in this suit. The whole theory of the application is, that something *may* arise, not that anything *has* arisen, which may have the effect of staying the suit.

In the present situation of the bankruptcy, the plaintiff cannot be stayed; he may be hereafter, by the defendant obtaining a certificate, as that would be a bar; or the plaintiff may elect to accede to the bankruptcy. True it is, a party will generally elect to prove his demand under the commission, as in the event of the defendant obtaining his certificate, he might thereby lose his demand altogether; but if the court were to grant the present motion, it would in effect be binding the plaintiff with a bankruptcy to which he has never acceded, to which probably he never may accede, and which in fact may never be consummated.

The defendant asks to stay the order, on the ground of his having become a bankrupt; this, I contend, is no ground to stay proceedings in this court, and would refer to *Eden* on

Bankruptcy, p. 3, et seq., where it is laid down that a commission of bankruptcy is no stay to proceedings.

By the 53rd section of the provincial act, it appears distinctly that it is altogether optional with the creditor, either to proceed with his usual remedies or prove under the commission ; and so he may in England until the defendant has obtained his certificate. On what ground, then, can the defendant ask to stay the order, when by the law of England, as well as under the provincial act, it is left entirely at the plaintiff's option which course of proceeding he will adopt ?

Let us suppose the debt to be such an one as is not provable under the commission (and nothing appears here to shew that *it is*,) in such case the plaintiff would be obliged to proceed ; so also if the plaintiff does not choose to elect. The act says, if the defendant obtain his certificate, it will operate as a discharge from all debts due at the date of the commission, and from all claims and demands made provable under it ; so that, as I have already stated, parties will generally elect to prove their demands under the commission. The bankruptcy is not in evidence, and to put it in evidence it would be necessary to file a cross bill ; but we do not take that objection—we have not elected to prove under the commission ; not having elected to do so, there is no bar to our proceeding, consequently the court cannot stay effect of the order—and would refer to *Exp. Benjamin, in re Phillips*, Buck 41, where it was decided that enforcing order to pay money into court, is not an election to proceed at law.

The only ground for the present application is, the impossibility to obey the order. What answer, let me ask, would this be to a creditor whose demand was not provable under the commission ? If insufficient to such a party, so it is also to a creditor who has not elected to prove under the commission. It is no answer in either case that this property is out of his hands ; he must either obey the order or be imprisoned, for “ he that cannot pay in the purse must pay in the person,” particularly when it is by his own default that he has placed himself in a position not to be able to do so.

The defendant may even now pay the amount into court,

and say to the sheriff, so much has been paid into court to abide the decision thereof; for the amount may ultimately become the bankrupt's, and so far as he can legally do so might deliver the same to the sheriff.

Under these circumstances, I hope your honour will dismiss this motion, with costs. A party asking a favour, and succeeding, must pay costs—Exp. Hancock, 3 Dan. and Chy. 523—a *fortiori* when the party asking a favour fails in his motion.

*Burns*, in reply.—The argument of the opposite counsel is not applicable to the present case. The motion is not to stay proceedings, but merely to suspend the operation of an interlocutory order. The order to pay money into court is only granted to secure the fund *pendente lite*.

The case of Exp. Benjamin does not apply here; this is simply a motion to stay the effect of an order, not to compel the party to elect. The plaintiff may, even after stay of order, go on to a decree and obtain an account. I do not dispute that the court may order an arrest, but no good can arise from so doing. I can see no good end in enforcing the order.

THE VICE CHANCELLOR.—I can readily imagine much benefit to be derived by plaintiff from having defendant brought to the bar, as by interrogating there he may be enabled to elicit such facts as would place him in a position to obtain his demand—as by disproving the trading, &c., and thereby supersede the commission issued. I can see no ground upon which I should stay the order—therefore must dismiss the present motion, with costs.

## WHITLA v. M'INTOSH.

A person claiming under a disseisor, may obtain a release from the disseisee notwithstanding he has previously executed what purported to be a conveyance in fee to a third person, void for fraud as well as for want of interest in the grantor ; and may file a bill to have such conveyance delivered up, without making the disseisee a party.

The bill filed in this cause, stated that one Ansel Belnap having become entitled to a grant of one hundred acres of land, located the same in the year 1820, in the township of Otonabee.

That by a power of attorney, bearing date 12th February 1820, Belnap authorised Charles Fothergill to obtain the patent for the said land, which he procured on or about the 10th April, 1820.—That the said C. F., pretending to have a power of attorney authorising him to sell the land so granted to Belnap, conveyed the same to one Charles F. Fothergill who subsequently sold it to William Whitla for a valuable consideration, who entered upon, cultivated, and died, seized of the land in question, leaving the plaintiff his heir-at-law.—That the defendant having ascertained some defect in the title of the plaintiff, went to Belnap and represented that the land was unoccupied, and in a wild state ; that the patent therefor had not been completed, and that it would be forfeited, unless the fees, amounting to £7 15s., were paid within eight days, which amount Belnap being unable to raise, and supposing that the land was, as defendant represented, in a measure, of very little, if any value, agreed to sell, and subsequently conveyed the same to the defendant for £10 ; whereupon the defendant instituted an action of ejectment against the plaintiff, and declared upon one demise by the defendant and one by Belnap, in which he had recovered judgment on the demise laid in the name of Belnap.

That on plaintiff's becoming aware of the circumstances attending the transfer of the said land by Fothergill, and that Belnap had never executed any power of attorney authorising



the sale of the land, he applied to Belnap in 1843, and, in consideration of £75, obtained from him a conveyance thereof, so as to enable the plaintiff to take such proceedings as he should be advised, in order to set aside the conveyance so obtained by the defendant, on the ground of fraud, &c.—Land originally not worth more than £100, but now, by the labour of the plaintiff, increased to £1000.—Prayed that the deed to the defendant might be cancelled, &c., &c.

To this bill a demurrer was filed, on the grounds of no equity, and for want of parties.

For the demurrer, it was contended, that if any fraud had been committed, it was on Belnap, and that he alone was the party to complain; and assuming, for the sake of argument, that the statement in the bill is correct, the second assignment (to the plaintiff) was a transfer of a mere *right* to bring a suit in equity to upset the conveyance made by Belnap to the defendant; that Belnap having absolutely conveyed all his interest in the land to McIntosh, he had no estate therein, but only a right to institute proceedings, which was not assignable.—That although the statement made would if true be sufficient to upset the deed to the defendant, yet any proceedings for that purpose must be instituted by Belnap, and that the purchase of such a right by any party, savoured of maintenance—Wood v. Downes, 18 Ves. 120; Prosser v. Edmonds, 1 Y. and C. 408; Wood v. Griffith, 1 Swan. 43; Bac. Ab. Maint. E. 2 M. and K. 590; 2 Story's Coms. 2nd ed., p. 311, n. 3.

That the inadequacy of price constitutes the deed to the defendant voluntary, under statute of Elizabeth, only as against creditors, not as between the parties to the conveyance.

That Belnap should have been made a party to the bill in some way, if not as plaintiff, as a defendant.

Therefore it was contended, the bill cannot be sustained.

For the plaintiff it was contended, that the conveyance from Belnap to M'Intosh having been obtained by fraud and misrepresentation, it was void *ab initio*, and that therefore the assignment to the plaintiff, who had been in possession for twenty years and upwards, ought to be deemed valid; and if

the conveyance to the defendant would be void against, creditors, as being voluntary *a fortiori*, it should be considered so when obtained by fraud, as against the plaintiff, who held the land under a supposed good title, and whose ancestor and himself had spent their lives in cultivating it; and that as this was a case which could arise only in a country like this, the court ought to accommodate its decisions to the peculiar circumstances thereof.

That the deduction of title on the part of the plaintiff is complete, and Fothergill being in possession of the patent gave a degree of credit to his acts; which circumstance, taken in connection with the distance and difficulty in the way of making inquiries respecting the land, accounts for none having been made.

That even had the land been wild and uncultivated at the time of the purchase by the defendant, it would still have been worth 100l.; the defendant therefore obtained it for one-tenth of this value, by false representations, knowing, as he did, that Belnap was ignorant of the value or state of the land. He in fact obtained it for about a one-hundreth part of its real value, by fraudulent and false representations being at the same time under an obligation to disclose the truth when inquired of him.

That the arrangement entered into, and conveyance executed between Belnap and the plaintiff, on discovering the true state of matters, accords precisely with the justice of the case; as thereby Belnap receives nearly the value of the land, if wild, and the plaintiff is secured in his improvements.

The purchase by the defendant is clearly fraudulent, and somebody must have the power of setting it aside; the demurrer, as far therefore as it rests on the first ground, must be over-ruled.

Belnap is not a necessary party to the suit; the purchase by the defendant being fraudulent, the estate remained in Belnap; and having conveyed it as he lawfully might to the plaintiff, for a valuable consideration, the plaintiff is the only person capable of impeaching the purchase, which is a mere mode of recovering his property, otherwise the conveyance for a valuable consideration moving from the plaintiff would

operate only in favour of the defendant. The deed to the defendant is perhaps void at law for fraud, in which case Belnap could have maintained ejectment; if so, the plaintiff in consequence of the conveyance, can equally maintain such an action; and if he can proceed at law, no objection can exist to his proceeding in equity, which furnishes a more effectual remedy by directing the specific delivery of the void instrument.

Viewing the matter in a different light, and admitting, for the sake of the question, that the plaintiff's purchase was the acquisition of a mere right to impeach, and that such a right is not transferable, yet the peculiar circumstances of the present case are sufficient to except it from the general rule. The plaintiff is no hungry speculator, "*seeking whom he may devour*," and purchasing doubtful rights with a mere view to the possible fruits of litigation; he is a person who having *bona fide*, but *mistakenly*, invested a large sum of money in improving the land, which belonged, in strict point of law, to Belnap, but under circumstances which imposed a strong moral obligation on Belnap to provide for the indemnity of the plaintiff; he has acquired a substantial interest in the land, and the right, by purchasing the title to the mere land (by far the least valuable part of the property), to substitute himself in Belnap's place as the owner of the entirety. If the moral obligations in question were to be regarded, the plaintiff was the substantial owner of the property, and the injury occasioned by the defendant's fraud was more to him than to Belnap. These considerations are of force in regulating the exercise of the discretion of the court. That the entry of Fothergill or Wm. Whitla, however, operated as a disseisin upon Belnap, and converted his estate into a right of entry; the conveyance therefore to the defendant, was void on this ground, although that circumstance afforded no defence to an action of ejectment resting on a demise in the name of Belnap, and therefore at law Whitla was defeated; he has however obtained a conveyance from Belnap, which is good to him, although it would not be good to any other person; for the disseisin created a tortious fee, which having been conveyed to William Whitla, has descended to plaintiff, and enabled

him to receive the conveyance in question, which operates as a release of Belnap's right of entry, and has perfected the title of the plaintiff. Plaintiff might obtain a stay of proceedings, or he might maintain an ejectment—Buckler's case 2 Rep. 55; 1 Prest. Abstr., 356; 2 do. 399; Roll. Abr. 662; Co. Litt. 271 n; Dyer, 134, Pl. 11.

The plaintiff's equitable title is clear; for although his estate was originally acquired by disseisin, it was unintentional, and has been purged by the subsequent purchase, for a valuable consideration; whereas the title of the defendant is upon this demurrer, double-dyed in fraud.

Therefore, it is contended that Belnap is not a necessary party to the suit; for having, while his estate was converted into a mere right, executed a conveyance to the defendant, which for that reason, as well as for fraud, was void, he releases his right to the terre-tenant (the only person capable of receiving a conveyance for him), who could, if ousted recover the lands at law, without Belnap's co-operation, and might be content to allow matters to remain as they are; but who being desirous of relieving his title from a cloud, may certainly, for such purpose, proceed alone. It is not the mere transfer of the right to impugn a *fraud*, it involves the *perfection* of a *defective* legal title: and the equitable right to relieve that title from difficulty follows as an incident.

The judgment of the Vice Chancellor over-ruled the demurrer.

*Sullivan* and *Esten*, for the plaintiff.

*Burns* and *Blake*, for the defendant.

#### IN RE ROSE, AN ALLEGED BANKRUPT.

A party suing out a commission of bankruptcy, under statute 7 Vic. chap. 10, must prove before the judge or commissioner, not only the act of bankruptcy, but also the trading. Such evidence cannot be afterwards received to uphold a commission issued without the proof having been given.

At a former sitting of this court, a motion had been made, in *Brewer v. Rose*, to stay the operation of an order of the court, of the 23rd January last, for the payment of £603 19 6½ into court, on the ground of defendant's bankruptcy, which was refused, and an order made for the arrest of Rose.



Mr. Turner, (solicitor for Brewer), thereupon applied for and obtained a copy of the proceedings, had before J. S. Cartwright, Esq., Judge of the Midland District Court.

The commission issued by the judge to the sheriff, recited the 20th section of the bankrupt act, 7 Vic. chap. 10 :—" And " whereas it appears that Roderick M'Bain Rose, of Kingston, " in the Midland District, trader, as it is said, hath become " and is a bankrupt, within the true intent and meaning of the " said act ; and whereas, John Alexander M'Donald, of " Kingston aforesaid, Esquire, a creditor of the said Roderick " M'Bain Rose, for upwards of fifty pounds, hath made appli- " cation, upon affidavit, to issue a commission of bankruptcy " against the said Roderick M'Bain Rose, according to the " form of the said act. Now I John Solomon Cartwright, " Esq., Judge of the District Court of the Midland District, " under, in pursuance of and by virtue of the powers, duties, " and authority, by the said act vested in and given to, and " authorized to be performed by me, do hereby appoint, &c., " to take, &c., of all the estate, &c., and to keep, &c., until " the appointment of assignees, &c." ; and appointed Wednesday, the 14th February, for the first meeting of the creditors,

Rose's declaration of insolvency :—" I the undersigned " Roderick M'Bain Rose, of Kingston, in the Midland " District, do hereby certify that I am unable to meet my " engagements. Dated this twenty-eighth day of December. " in the year of our Lord one thousand eight hundred and " forty-three."

" R. M. Rose."

Witness, " K. M'Kenzie,"

*Attorney at Law,*

*Affidavit of J. A. M'Donald, Esq.*

<p>" Canada, " Midland District, " To Wit :</p>	}	<p>John Alexander M'Donald, of the town of Kingston, in the Midland District, Esquire, maketh oath, and saith, that Roderick M'Bain Rose, of Kingston, aforesaid, is justly and truly indebted to this deponent in the sum of sixty-five pounds, five shillings, and elevenpence, for so much money due from the said Roderick M'Bain Rose to</p>
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“ this deponent, upon the balance of an account stated  
 “ between this deponent and the said Roderick M’Bain Rose ;  
 “ and this deponent further said that the said Roderick  
 “ M’Bain Rose, as this deponent verily believes, is a trader  
 “ within the meaning of the statute of this Province relating  
 “ to bankrupts, and resides in the said town of Kingston; and  
 “ this deponent further saith, that the said Roderick M’Bain  
 “ Rose hath become and is a bankrupt, within the true intent  
 “ and meaning of the said statute, as this deponent hath been  
 “ informed and verily believes, by his filing on the ninth day  
 “ of January instant, with the judge of the District Court of  
 “ the Midland District, a declaration in writing, signed by  
 “ him, the said Roderick M’Bain Rose, and attested by Ken-  
 “ neth McKenzie, Esquire, Attorney of Her Majesty’s Court  
 “ of Queen’s Bench in Upper Canada, a copy of which decla-  
 “ ration is hereunto annexed.”

*Affidavit of C. A. Sadlier.*

“ Midland District,        } Charles Anderson Sadlier of the  
     “To Wit.                } town of Kingston, gentlemen,  
 “ maketh oath that Roderick M’Bain Rose did, on the ninth  
 “ day of January instant, commit an act of bankruptcy, by  
 “ filing a declaration of insolvency, a true copy of which is  
 “ annexed to the above affidavit of John A. McDonald,  
 “ Esquire.”

The solicitor for Brewer, (a merchant residing at Boston), thereupon filed a petition addressed to his Honour the Vice-Chancellor, setting forth the issuing of the commission, and stating that the commission so issued was null and void, inasmuch as it was issued on no other evidence of *trading* and an act of bankruptcy than the affidavit of McDonald, the petitioning creditor, and if affidavit admissible for such a purpose it was insufficient, and because it did not appear that the said Sadlier, the only other witness to the *alleged* act of bankruptcy, was *not* a creditor of Rose.

That on the 24th November, 1842, the petitioner had exhibited his bill against Rose, for an account, &c. of goods consigned by petitioner to Rose, as his agent, who, by his answer, admitted a balance due to petitioner of £603 19s. 6½d.

That on the 23rd November, 1843, an order was obtained

calling on Rose to pay the amount, so admitted to be due, into court; which having been disobeyed, petitioner, on the 23rd January last, obtained an order for payment within four days or in default, &c.; which having been also disobeyed, an order was made, on the 8th February, for arrest, &c.

That money not having been paid, Rose was by virtue of the last order, brought to the bar; and by order of 15th February, committed to jail.

That petitioner had been advised that the said commission ought to be superseded, in order to enable him the better to prosecute the said suit, and particularly the orders of 23rd November, and 23rd January.

(Signed,)

ROBERT J. TURNER,

*Solicitor for Gardner Brewer, the petitioner.*

This petition was supported by the affidavit of Mr. Turner, corroborating the several facts set forth in it.

Upon the motion coming on to be heard before the Vice-Chancellor, the counsel for the petitioning creditor took a preliminary objection, on the ground of the signature to the petition not being attested—the practice requiring the signature by petitioner to be attested by the solicitor; and although the petition here is signed by the solicitor, it is contended, that his signature ought to be attested.

*For petitioner.*—The attestation by solicitor, is for the purpose of identifying the petitioner, who, in the event of his application failing, may be ordered to pay the costs: here, that object is attained by the solicitor himself signing, and the court will take notice of its own officers—the petitioner being resident in a foreign country.

*Per Cur.*—Let the argument proceed, subject to any benefit to be derived from the objection.

*For Petitioner.*—As stated in the petition, the commission was issued on insufficient evidence, there being no proof of *trading*, except that given by the creditor, which is inadmissible for that purpose.

The power to supersede a commission thus issued, must exist somewhere; it must be in the Vice-Chancellor, although he does not issue the commission—it cannot be in the inferior judge. An appeal is given from his subsequent orders, and

adjudications ; *a fortiori* it must exist when the object is to subvert the commission itself.—See *In re Gillespie*, in this court. In England the appeal is to the Lord Chancellor, under precisely similar circumstances. For the sake of convenience in this country, the issuing of the commission and the adjudication are interwoven into one act ; the commission although a different act from the one in England, is substituted for it, and governed by the same rules.

If the petition to supersede be within the 68th section, it is properly addressed to the Vice-Chancellor.

The issuing the commission involves an *adjudication* ; therefore, other evidence, than that of the petitioning creditor, of the *trading*, would be requisite by the law of England—it is impossible to suppose, that the *trading* was not to be proved. The 22nd clause in effect requires it, because proof of bankruptcy necessarily involves proof of trading, as it is only certain persons designated in the first clause, who can become, bankrupts. In England, the bankruptcy must be proved by other evidence than that of a creditor.

The same acts done by a person, *not* of the class designated in the act, would *not* be an act of bankruptcy ; therefore, he must be shown to be a person such as could be declared a bankrupt, and consequently, forms *part* of the proof of *bankruptcy* ; and as we are governed by the same rules in that respect, as in England, the ability to commit the act must be shown by the same kind of evidence as the act itself, that is ; evidence other than the petitioning creditor's—in this case there is no such proof ; and, although the evidence of the creditor *may be admissible*, it is not sufficient of itself to *sustain* the commission.

[Affidavits had been filed by McDonald in support of the commission ; one of John McGann, proving the trading ; one of McDonald's, proving the nature of his demand against Rose ; one from K. McKenzie, proving the declaration of insolvency to have been made ; and one of C. A. Sadlier that he had never been a creditor of Rose.]

The commission cannot be supported by subsequent evidence ; having been *irregularly* issued it never was a legal commission, and no evidence now can be received to make it



such—in England the practice is very different from that pointed out by our act; a very slight affidavit is sufficient to strike a docket against a party, and to justify the issuing of a commission. An affidavit, however, be it ever so weak, must be filed before even the docket will be struck, or the commission issued; and to find a case similar to the present, we must imagine the Lord Chancellor so far forgetting his duty as to order a commission to be issued without any affidavit at all being filed. In fact, our act, which combines the adjudication and the issuing of the commission into one proceeding, requires all the evidence material to the case to be adduced *before* the commission issues, for obvious reasons—all the evidence in the world, therefore, adduced *subsequently* will not support it, because the previous production of such evidence is made essential by the act, and it, in fact, forms the foundation on which alone the commission can be sustained; the commission, it is therefore contended, must be superseded.

See *Ex parte Osborne*, 1 Rose, 387, *Exp. Wood*, id. 298; *Exp. Gooldie*, 2 id. 330; *Exp. Rowe*, id. 339; *Exp. Chamberlain*, 19 Ves. 481, *Eden* 73, 2 V. & B. 177, 180 n.; *Exp. Wells*, 1 M. & M. 272.

For the petitioning creditor.

It is competent now to read affidavits in support of the commission; there is a marked distinction between the case of *Exp. Gillespie* and the present; in that, there was *no* evidence of an act of bankruptcy; in this there is *evidence*, although possibly *insufficient*; the difference therefore is between *insufficient* evidence and *no* evidence.

Under the 68th and 70th clauses, this court can do what the Lord Chancellor would do; the Court of Review is the same as the Court of Review in England, which does not issue the commission any more than the Vice-Chancellor here

No proof of the trading is necessary; our act does not contain the words “and trading,” which are inserted in 6 Geo. 4, although our act follows the rest of the clause.

That the evidence is required for the protection of the bankrupt—not of the creditors—there should have been a motion and an order therefore to certify proceedings to this court; *non constat* the proceedings accompanying the present

certificate, include all the proceedings had before the judge below ; the appeal is from the *adjudication*, not from the commission, other evidence may therefore be received—Exp. Welden, 3 Dea. 240 ; the bankrupt could resist an action brought against him, by giving evidence of other acts.

Exp. Burgess, Buck 233 ; Exp. Gallimore, 2 Rose 234 ; Exp.—, Buck 137. It would therefore be absurd to supersede it, when it could be sustained by other evidence at law. That the trading is not required to be proved as strictly as the act of bankruptcy, and as the petition represents the party as a trader at one time, it is only fair to presume that he continued so. *Exparte Baily*, 2 M. & A. 86. The affidavit of petitioning creditor will in some cases be received ; see 1 D. & C. 460. If, however, the affidavits be deemed insufficient, the court will remit the case to the court below, and then the commissioner may receive the additional evidence, if this court will not.

The Vice-Chancellor superseded the commission, overruling the preliminary objection.

*Sullivan and Eston*, for Brewer.

*Burns and Blake*, for petitioning creditor.

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## SHAW V. BURRELL.

### BILL FOR SPECIFIC PERFORMANCE.

The bill stated, that previously to the 31st May, 1830, plaintiff and one Le Marche were desirous to purchase from the then proprietor thereof, lot No. 14, in the 8th Con. N. D. of Toronto ; but the proprietor being unwilling to divide the property into two lots, it was arranged by plaintiff and Le Marche, that he (Le Marche) should purchase the whole lot and re-sell the east half to plaintiff. In pursuance of which arrangement Le Marche purchased the whole of the lot from the owner, who gave Le Marche a bond to convey on payment, &c. In further pursuance of the agreement, Le Marche executed a bond to plaintiff for the sale and conveyance of the east half ; and in further pursuance of the agree-

ment, Le Marche entered into, and by those claiming under him has continued ever since in possession of the west half, and plaintiff entered into possession of the east half, and improved the same.

The plaintiff paid the original proprietor, by the direction of Le Marche, the sum of £12, in satisfaction of so much interest due from Le Marche to such original proprietor, and from the plaintiff to Le Marche, and obtained a receipt therefor.

That afterwards, Le Marche sold and conveyed his interest in the said premises to one T. B. Phillips, subject however, to plaintiff's right to the east half; and that Phillips subsequently sold to one Delany, subject as aforesaid; that Delany some time afterwards sold to one Loughhead, subject as aforesaid; and that Loughhead sold to one Abijah Lewis, subject also to the claim of the plaintiff; whereupon Lewis applied to, and obtained from, the original proprietor, a new bond for the lot, and gave up the old one to be cancelled; and that afterwards Lewis sold to the defendant, and provided, in the conveyance to the defendant, that the defendant should pay the plaintiff for his improvements.

That the plaintiff had performed work for Lewis, in payment of interest on the purchase money to be paid by plaintiff.

That on the 1st of June, 1835, plaintiff tendered the first instalment of his purchase money to the original proprietor, who having received it from the defendant, referred the plaintiff to him; the plaintiff thereupon tendered the amount to the defendant, who refused to receive the same, unless the plaintiff would pay him £300; and remarked to the effect that he, the defendant, "would do plaintiff out of his half of the lot."

That the defendant had lately paid to the original proprietor the principal money and interest due upon the bond to Lewis (which would have been the amount due upon bond to Le Marche), and had obtained a conveyance of the whole of the lot, bearing date the 3rd day of October, 1840.

That the plaintiff had continued in possession ever since he obtained bond from Le Marche. The defendant saw him in possession, and had notice before he obtained conveyance, or

paid his money. That the defendant had commenced an action of ejectment against plaintiff; and that Phillips, Delany, Loughhead, and Lewis had respectively notice of plaintiff's claim; and prayed that an account might be taken of the purchase money and interest, on payment whereof the defendant might be decreed specifically to perform, &c.; or if the plaintiff was not entitled to specific performance of contract, the defendant decreed to pay the plaintiff the amount of his improvements, &c.

The answer, as read by the plaintiff, proved the purchase by Le Marche, and sale to plaintiff, and bond to Le Marche, and from Le Marche to plaintiff, as stated in the bill; possession of Le Marche under purchase and agreement; also possession and improvements by the plaintiff; also receipt for interest, and that the defendant had seen it; also sales to Phillips, &c., and reservation in favour of the plaintiff; also conveyance to the defendant, as stated in the bill, and notice of the plaintiff's being in possession of the east half of the lot previously to payment by the defendant of purchase money, &c.

On the cause coming on to be heard, it was contended, on the part of the plaintiff, that the evidence, &c. establishes the plaintiff's equity on the contract; the part performance; the improvements and continued possession and fullest notice thereof on the part of the defendant before he had completed his purchase.

The only question that can arise is, whether the plaintiff has forfeited his title to a specific performance of the contract by his default in carrying it into execution; upon this point it may be shown that two years' interest was paid, and subsequent interest appears to have been paid by Loughhead, who evidently waived all default on plaintiff's part; that all default appears to have been waived up to the time the defendant purchased, and consequently any forfeiture must have accrued subsequently; that shortly after such purchase the plaintiff tendered the first instalment.

That the many changes of ownership in some degree excuse the delay, and that the circumstances were not such as to rescind the contract; it is only where the contract is



unperformed that it can be rescinded; where it has been partly performed, so that the parties cannot be restored to their former position, the remedy of each is *upon*, not to *rescind* the contract. The plaintiff here has been encouraged to act upon this contract for years, and to expend both time and money under it. Had a bill been filed in 1837, the court, under the circumstances would have executed the contract. Since that time the defendant, having had a sufficient remedy, is bound by his acquiescence—for a party intending to rescind must be prompt—time is not of the essence of the contract; it is true, time, even in that case, is to be regarded, but only where nothing has been done; where the contract has been partly performed, the court executes it *in toto*, giving compensation for the delay; the present case admits of full compensation by the payment of interest; the nonpayment of money is always relieved against.

The result of all cases is to shew that where time is not of the essence, it is nevertheless to be regarded to this extent; that where *great delay* has occurred on one side, and no *acquiescence* in it on the other, but prompt action, specific performance will be refused, when the parties can be placed in *statu quo*.

Previously to the establishment of this court, no remedy existed against the plaintiff; under such circumstances, however, a purchaser not paying his money, but acting on the contract, should be stopped by demand made, or notice, otherwise he will now be entitled to specific performance.

In this case, admitting for argument's sake, that without the tender a forfeiture would have accrued to the defendant, after his purchase and before the establishment of the court, it was waived by his subsequent acquiescence for three years the plaintiff during that time continuing in possession under and adhering to the contract.

*Cases cited on the part of the plaintiff*,— — — v. Curties, 4 Bro. C. C 329; Newman v. Rogers, *ib.* 391; Seton v. Slade, 7 Ves. 265; Lloyd v. Collet, 4 Br. C. C 469; Gill v. Fleming, 1 Ridgw. P. C. 420; Lawrence v. Butler, 1 Sch. & Lef. 13; Marquis of Hertford v. Boore, 4 Ves. 719; Marshall v. Corporation of Queensboro', 1 S. & S. 520; Gregory v. Mighell, 18 Ves. 328

*For the defendant.*—There is a great difference in the circumstances of this and the parent country ; money is worth much more here than in England. The refusal by the defendant to accept payment from the plaintiff was sufficient notice of repudiation of contract, and he could not have proceeded against the plaintiff until he had obtained his deed ; the plaintiff has never paid but two years' interest. When it is intended to be so, time will be considered of the essence of the contract. In the present case it clearly is so ; for when the first purchaser (Le M.) became liable for the whole amount of the purchase money, he contemplated the punctual payment of the instalments by the sub-purchaser—the plaintiff.

The plaintiff has been, or might have been, amply remunerated by the produce of the property for his labour, time and money expended in improvements. The property is now greatly increased in value, which is a very material circumstance to be considered ; for a party cannot be allowed to lie by until he sees a rise take place in the value of property and then come in and claim to have a contract specifically performed.

In this case the plaintiff ought to have instituted proceedings sooner ; he should have filed his bill immediately he discovered the defendant was inclined to insist on the forfeiture. Altogether the present seems more to resemble a bill for the execution of a trust, than for the specific performance of an agreement.

*Per Cur.*—The plaintiff could not have proceeded in equity before 1840, when the defendant obtained the deed.

The defendant was without remedy either at law or in equity, (either to *rescind* or *establish* any contract, the plaintiff never having signed any), until the deed under which he now holds was given. It is admitted that if the defendant had a remedy, he would be bound by his acquiescence ; he, however, could not proceed until he obtained the deed. The defendant has done no wrong, and therefore entitled at all events to costs. The plaintiff, having caused the suit, should pay the costs.

*Cases cited for the defendant.*—13 Ves. 225 and 289 ; 2 Mer. 140 ; 3 Mer. 84 ; 3 Madd. R. 449 ; 12 Ves. 325 ; 2 Sch. & L. 685.

*For the plaintiff in reply.*—The act insisted upon by the defendant, as indicating an intention to rescind the contract, in his refusal to accept the payment of the purchase money ; but it is contended it was not competent for the defendant at that time to do so ; he should at once have taken some step or done some act indicative of his intention to rescind, if the plaintiff had forfeited his right to have the contract specifically performed ; and that even if he had, the defendant's subsequent acquiescence in the possession, &c. of the plaintiff waived such forfeiture ; the language in all the cases being, that a party so intending must be prompt in acting.

*Esten and Blake* counsel for the plaintiff.

*H. J. Boulton and Burns* counsel for the defendant.

Specific performance, &c., decreed.

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23RD AND 27TH AUGUST, 1844.

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### MERRITT V. IVES.

The court will receive parol evidence to rectify a written instrument, notwithstanding the language used was that intended by the parties, where the legal effect of such language is different from what was the intention and agreement of the parties.

The facts of the case, and the leading cases cited by the counsel, are set forth in the judgment of the court.

*Burns and Blake* for the plaintiff.

*Sullivan and Esten* for the defendant.

THE VICE CHANCELLOR.—The facts of this case, when divested of a great deal of matter calculated in some respects a little to obscure it, I take to be shortly these :

An agreement was entered into between the plaintiff, as shipper, and the defendant, as owner of a certain vessel, to convey from St. Catharines to Kingston a considerable quantity of flour. The season was becoming late ; and it was expressly stipulated and understood, that this perishable cargo should for greater security be stowed under hatches ; and an additional rate of freight was demanded and agreed to be paid on this understanding. Had this agreement been intelligibly reduced to writing, no question could exist that any part of the consignment lost or damaged, in consequence

of its being placed upon deck, would have been the loss of the owners of the vessel.

The schooner was laden partly at St. Catharines, at which place was the plaintiff's establishment in business, and partly at Port Dalhousie ; but previously to her being ready to sail, it was discovered by the gentleman who acted as the plaintiff's book-keeper, that part of this flour was to be exposed upon deck ; and this was remonstrated against by him, as being at variance with the terms of the agreement entered into between his employer and the owner of the schooner, with whom this discussion took place. It was stated, however, that this was done with the plaintiff's knowledge, and was to be at his, the owner of the schooner's risk. Directions were thereupon given by the book-keeper, to Mr. Beaton, the person acting for the plaintiff at Port Dalhousie, in respect to this shipment, to fill up the bill of lading specifying that the deck load was to be at the risk of the owners of the schooner. The letter conveying these instructions to the shipping agent was given to the defendant, unsealed, (and as the witness believes, having been read by him), to be delivered by him at Port Dalhousie. The fate, or precise contents of this letter cannot be known ; for in consequence of Mr. Beaton's death, neither the letter nor his testimony can now be obtained ; but it is admitted that a letter was conveyed by the defendant, to the shipping agent in question ; and a bill of lading in his handwriting, was on that occasion presented to and signed by the master of the schooner Canada, in the following words :

" Shipped, in good order and condition, by W. H. Merritt, Esquire, of St. Catharines, on board the schooner Canada, John Mason, master, three hundred and fifty-two barrels, and two half-barrels, of flour, to be delivered in the same order and condition, the dangers of the navigation excepted, unto Wm. Dickinson & Co., of Kingston, they paying freight for the same at the rate of thirteen and one-half pence per barrel ; deck load, at the risk of the owners.

" Port Dalhousie, 19th Nov. 1838.

"(Signed)

JOHN MASSON."



A storm arising before the vessel reached Kingston, that part of the flour which was upon deck was lost ; and an action of assumpsit for breach of contract in respect thereof, was brought by the present plaintiff. The bill of lading was produced at the trial, together with some evidence of the antecedent agreement. The jury returned a verdict for the plaintiff ; considering, without doubt, by aid of the explanatory testimony, that the word "owners" as used in the bill of lading, as it very often is in popular colloquial mercantile language, meant *owners of the vessel*, in contradistinction to *shipper of the freight*. They were satisfied that it was so used as evidencing the agreement previously entered into, testimony respecting which was permitted to be given. And if the words there used could have borne that legal construction the plaintiff's remedy would have been complete at law. This question however was reserved ; and it was the opinion of the Court of Queen's Bench that the words could not receive such legal construction, but that the word "owners" must be taken with reference to the antecedent words "deck load." It could not therefore depart from the rigid rules as to the construction of language used in written instruments, and receive parol evidence of the previous agreement in explanation of it, and to shew that the words "of the vessel" being in reality intended, might be supposed to stand upon the document. It is this absence of all legal remedy that compels the plaintiff to come into equity.

I may here remark, that it is stated in the evidence of the master of the schooner, taken on behalf of the defendant in this cause, that the words "Deck load at the risk of the "owners," were inserted in the bill of lading, at his suggestion after the paper had been prepared, and that he had objected to sign the same (when presented to him by Mr. Beaton) until they were inserted ; that such insertion was made in his presence upon the head of a flour barrel, &c., and that this addition had been insisted on for the protection of the owners of the schooner, because Beaton the agent "seemed to consider the deck load at the risk of the owners of the vessel." Now when previously examined on the trial at law, it appears from the evidence proved in this cause he stated, "that if he

“ had understood the words at the end of the bill of lading “ meant owners of the vessel he would not have signed it ; “ he thought it meant owners of the flour.” And on his being questioned as to his not having, at the time of signing it, *an explanation as to the meaning of the word “ owners,” in the said document?* his reply was, “ that he did not ask *any explanation*, because he did not mean to implicate his owners ” not a word of this important decision having been made *at his desire*, to put the matter beyond the necessity of explanation. Had the statement indeed been then made that this clause, had been added to the previous portion, on the head of a flour barrel by Mr. Beaton, I do not think that any intelligent jury having the document before them, could have believed in the correctness of his recollection ; for it is manifestly written with one broad pen, freely and at one time while the filling up of the blanks left in the first instance, containing the christian name of the master, and the number of barrels, &c., are done with a totally different pen, and in a constrained hand, and were in all probability written on board the schooner at the time referred to, and on the head of a flour barrel.

Feeling satisfied upon the evidence generally, that the agreement was the one averred in the pleadings, and that the intent of the person acting on behalf of the plaintiff was consistently with his instructions, and in accordance with the agreement, to secure a written admission that such portion of the consignment as was placed on board inconsistently therewith, was not to be at the shipper’s risk—though in attempting this he made use of such an unfortunate form of words as gave to the paper a legal effect the very reverse—it becomes a question whether the Court of Equity can, by aid of parol evidence, so ascertain what was the real agreement originally binding upon the consciences of the parties, as to rectify any mistake in the written memorandum, or intended evidence of that agreement. To this end it seems that either on the ground of fraud or mistake, the court has always exercised jurisdiction, and this will be best illustrated by reference to a few of the cases most pertinent to the present in which the equity judges of England have expounded the doctrine upon the subject.

In *Townsend v. Stangoom*, 6 Ves., 328, it was held that parol evidence was admissible in opposition to a bill for a specific performance of a written agreement upon the heads of *mistake or surprise*, as well as fraud; and on such evidence the bill was dismissed.

Another bill for specific performance of the agreement corrected according to the same evidence, contradicted by the answer, was also dismissed.

In cases of latent ambiguity requiring explanation, aliunde *Baker v. Payne*, 1 Ves., 456; *Joynes v. Statham*, 3 Atk., 388, established the doctrine, "that if the court can be satisfactorily informed that the agreement is not such as the party thought it was, it shall not be enforced."

The Lord Chancellor denied the doctrine that because parol evidence would not be admitted at law it is therefore inadmissible in equity, where an agreement has been entered into under a mistake as to its literal effect. And a very small research into the cases will show general indications by judges in equity, that, that has not been supposed to be the law of this court.

In *Hinkle v. R. Ex. Assurance Company*, 1 Ves. 317, the court did not rectify the policy of insurance; but they did not refuse to do so upon the ground that such being the *legal effect* of it, therefore this court could not interfere; and Lord Hardwicke says expressly, "there is no doubt the court has jurisdiction to relieve in respect to a plain *mistake* in contracts in writing as well as against fraud in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified."

In that case the *evidence* was not strong enough to induce Lord Hardwicke to interfere to aid what he states to be "the harshest case that could happen."

In the case of the *Countess of Shelburne v. Inchiquin*, the Lord Chancellor stated, "I think it impossible to refuse, as incompetent, parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties. To be sure it must be strong irrefragable evidence, but I do not think I can reject it as incompetent. It is the only way of explaining latent ambiguities." There the evidence of the solicitor was admitted,

In *Matteaux v. London Assurance Company*, a policy of insurance differing from the label, which is the memorandum or minutes of the agreement was made agreeable to such label.

In *Simpson v. Vaughan*, 2 Atk. 31, money had been lent to two persons, and a bond either through fraud or want of skill, made joint only instead of joint and several, and the court relieved on the ground of mistake, Lord Hardwicke saying, "I do not think this was a fraud in Baker, but merely a mistake, and this is a head of equity on which the court always relieves."

*Langly v. Brown*, 2 Atk., 195, was a bill to set aside deeds alleged to have been executed through fraud or mistake; the bill was dismissed by Lord Hardwicke, but the rule broadly stated that "mistakes and *misapprehensions* in the drawers of deeds, are as much a head of relief as fraud and imposition."

*Joynes v. Statham*, 3 Atk., 388, shows that omission in an instrument by mistake stands on the same ground as omission by fraud.

In *Ramsbottom v. Gosden*, 1 Ves. & B. 165, the omission of a particular stipulation in a contract drawn up by a solicitor in pursuance of verbal instructions, was supplied on parol evidence of the intention of the parties.

And in the late case of *Ball v. Storie*, 1 Sim. & St. 210, (1823) Sir John Leach observed, "the rule at law that evidence is not admissible to contradict or explain a written instrument stated *simpliciter*, is received in equity as well as law. A court of equity does, nevertheless, assume a jurisdiction to reform instruments, which either by mistake or fraud of the drawer, admit of a construction inconsistent with the true agreement of the parties. And of necessity in the exercise of this jurisdiction, a court of equity receives evidence of the true agreement in contradiction of the written instrument. If the true agreement and the consequent mistakes in the written instrument be established by the evidence, can a court of equity refuse relief, because it appears, that the party seeking relief himself drew the instrument: unless it be a principle in a court of equity not to relieve a party against his own mistakes.

"There is no such principle in a court of equity, common



“mistake is an ordinary head of jurisdiction; and every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake.”

The prayer of the bill is, that the bill of lading may be corrected in the particulars of the mistake, and be made in accordance with the agreement, and for an account of the flour lost and for the value thereof, &c., and I think that the relief sought ought to be granted.

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BLOOR & EASTWOOD V. BANK OF UPPER CANADA, DEEDES & BOULTON.

Bill by judgment creditor, to redeem prior mortgages, and foreclose subsequent purchaser with notice.

The bill stated that on the 8th, May, 1840, one Patrick Lawrie executed a mortgage on Lot No. 6, broken front, Concession A., in the township of Hamilton, to the Bank for £300, payable in one year with interest—default made in payment, &c.

That Lawrie, by indenture dated 5th June, 1840, had mortgaged the same premises to the defendant Deedes, for £400, payable in one year with interest—default, &c.

That in Trinity Term, 1840, plaintiffs recovered judgment in Queen's Bench against Lawrie, to secure £1,005 8s. 3d., upon which a fi. fa. against goods, &c., had been issued and returned “nulla bona.” That thereupon a fi. fa. against lands had been issued, directed to and placed in the hands of the sheriff of the Newcastle District, under which he seized and advertised the mortgaged premises for sale, on the 25th of Sept., 1841.

That no sale had taken place, and writ still unsatisfied. That on the 8th of October, 1841, Lawrie had conveyed to defendant Boulton. That Boulton had notice of plaintiff's judgment and writs thereon, and that he had not paid any valuable consideration; and prayed that the plaintiffs might be admitted to redeem the mortgages to the Bank of Upper Canada and Deedes, and that Boulton may be decreed to redeem the plaintiffs or be foreclosed.

The answer of Boulton admitted the mortgages to the Bank of Upper Canada, and Deedes, and that fi. fa. against

the lands was placed in the sheriff's hands, and that the sheriff seized, &c.; also the conveyance to him by Lawrie, and notice of plaintiff's writ at the time of execution thereof, and that he had not paid the whole of his purchase money.

The Bank and Deedes admitted the conveyances, &c., as stated in the bill.

On the cause coming on to be heard,

*Strachan*, for the Bank of Upper Canada and Deedes, consents to be redeemed.

*Esten*, for the plaintiffs.—The mortgage-deeds and conveyance to Boulton, are admitted by the necessary parties, and all that remains to be proved is, the right of the plaintiffs to redeem; or in other words, the judgment and *fi. fas.*

A judgment creditor has a right to redeem.—*Stonehouse v. Thompson*, 2 Atk. 400; *Shirley v. Watts*, 3 Atk. 200; *Angel v. Draper*, 1 Ver. 399; *Coote*, 539.

As the defendant was the purchaser of a mere equity, notice was unnecessarily charged.—*Baker v. Harris*, 16 Ves. 400; having been charged, however, it is clearly proved.

*H. J. Boulton*, for the defendant Boulton.—The first point to be considered is, whether a judgment in this country attaches upon the land? The law courts have already decided the question in the negative, and this court must be governed by the same rules. All the decisions in England refer to writs of *elegit*; in this country none can issue. The courts having already determined that point, this court will not say the Court of Queen's Bench can issue such a writ—in England under the provisions of the Statute of Frauds, this writ extends to trust estates, and under it the rents only are taken—on the other hand, the writ against the lands here issues under 5 Geo. II.; and according to that act, lands are as goods, &c.

Lawrie, at the time of execution being issued by the plaintiffs, had merely an equity of redemption, which cannot be seized under a *fi. fa.*—*Doe McIntosh v. McDonald*, 5 & 6 Will. IV.

The defendant is charged by the bill with fraud, in having purchased without consideration; it was therefore necessary for him to examine witnesses, to prove consideration paid.—1 Jac. 491.

*Blake*, in reply.—Notice, and no consideration, are charged in the bill, so that in case notice could not be shewn, the plaintiffs might be in a position to dispute the consideration. If it be a fraud to purchase without any consideration, it would here be considered equally so, to purchase with knowledge of all the circumstances. Case so clear, unnecessary to argue it.

*Decree, according to the prayer of the bill.*

# THE UPPER CANADA JURIST.

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IN CHANCERY.

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McVEAN V. WOODSELL.

Injunction—Lease, construction of—Assignee of Lease or part thereof, entitled *pro tanto* to benefit of covenant for a renewal and customary right of pre-emption.

The bill and supplemental bill filed in this case stated, that in December, 1841, the defendant and one James Sullivan, agreed to apply for a lease for twenty-one years, of lot No. 6, in the 7th Concession, N. D. Gore of Toronto, and that the lease should be taken in the name of the defendant, who, as to the east half should be a trustee for the said James Sullivan; that in pursuance of such agreement application was made to Government for a lease, which was granted, by Letters Patent, and defendant gave Sullivan a writing evidencing his title to the east half, agreeing to give the same to him in as ample a manner as he (defendant) held it; that in further pursuance of agreement, the defendant entered into possession of the west half, and Sullivan into possession of the east half, and remained in possession until the sale to plaintiff.

That the said lot was shortly after set apart, by his Majesty, for the use of King's College. That it was and had for a number of years, been the custom of his Majesty, to extend to lessees, &c., on the sale of lands so leased, a right of pre-emption so as not to sell such lands to any other person or persons, until the option of purchasing the same or not, had been offered to such lessees, &c. Also the pursuance of such custom by the college with respect to the lands set apart for the use thereof.

That in June, 1827, Sullivan sold the east half to the plaintiff, whereupon the instrument made by the defendant

to Sullivan, was destroyed, and the defendant executed another instrument in writing, whereby it was witnessed, that the plaintiff took possession of the east half for the remainder of the term, and had continued in possession ever since, and cleared sixty acres thereof.

That in 1842, the defendant applied to the college by virtue of the said custom, as a *sole lessee*, to purchase the whole of the said lot, and the plaintiff being kept in ignorance thereof, and being thereby prevented from making any opposition to such application of the defendant, and the college receiving no notice of any opposition, conveyed the said lot absolutely to the said defendant; and that the defendant had admitted to several persons, that he was a trustee of the said east half, for the plaintiff. That it is customary in the township, for two or more persons to take a lease in name of one, as the defendant and James Sullivan did.

That the plaintiff owned four hundred acres adjoining the said east half, but never cleared or improved the same, confining his improvements to the said east half, in full confidence that he should be able to renew or purchase. That the instrument in writing, of June, 1827, was mislaid or lost shortly after it was executed, and has not since been found. And that the defendant had admitted to third parties, that the said Sullivan was entitled to half the interest in the said lease, as to the right of renewal and pre-emption, as he, the defendant, held the same; and prayed, that the defendant might be decreed to convey the said east half to the plaintiff, and that the defendant might be restrained from commencing or prosecuting any action of ejectment, &c.

Upon this bill the plaintiff had obtained a special injunction, and the defendant having filed his answer, whereby he denied the agreement between Sullivan and the defendant—admitted lease of 1822, for twenty-one years—and said that after he had obtained such lease, Sullivan applied to him to sub-lease to him (Sullivan) the east half of the said lot, *for the space of time the same had been granted by the crown, and the defendant granted such request*—that he did not sell his right or title to the said east half, but sub-leased the same to Sullivan, at the same rate as the defendant was bound to pay



the Crown, and reserved the rents to be paid to himself, and gave Sullivan a memorandum in writing to that purport, sometime in 1825—denied executing any instrument to Sullivan, recognizing his title to the said east half, or acknowledging that the defendant held the same as trustee—said that he entered into possession of the whole of the said lot, and subsequently sub-leased the east half to Sullivan, who continued in possession thereof, until he disposed of his leasehold to the plaintiff—admitted his belief of the existence of a practice in the public offices to offer public lands to occupant, but not always adhered to, and that it might be true that such practice was constituted by the college—that some time in 1827, the plaintiff entered into a contract with Sullivan as stated in the bill, that the lease given by the defendant to Sullivan, was thereupon given up to the defendant, who made a new lease to the plaintiff *for the residue and remainder of the said term of twenty-one years*, in the said east half, in the words, &c., following:—  
“Upper Canada, Gore of Toronto, June 24, 1827, This agreement witnesseth between John Woodell and Alexander McVean, the said Alexander McVean doth take and enter on the east half of lot No. 6, (at the time of the above date it being a Crown reserve,) Northern Division of the Gore of Toronto; The said Alexander McVean doth take full possession of the above east half of lot No. 6, to hold it until the end of twenty-one years, from the 25th day of December, 1821, by paying yearly, and every year, for the first seven years of the lease of the said John Woodell, three dollars and one-half; and for the second seven years of the lease of the said John Woodell, seven dollars; and for the third and last seven years, ten dollars and one-half, to the said John Woodell, his executors, administrators or assigns, all the aforesaid payments to be respectfully made on the 4th day of June.” Denied that the plaintiff was then in possession under said lease or otherwise, than as an over-holding tenant, or that the plaintiff had improved the same, otherwise than was necessary to make the same available to him,—admitted the purchase from the college for the price or sum of 25s. per acre, and that the college had sold

to the defendant, as he was the lessee of the said lot, and submitted that if the college had not done so, the defendant had a perfect right to a renewal of the lease for a further term of twenty-one years, under the covenant contained in the lease for renewal. Denied that he ever admitted he was a trustee of the said east half for the plaintiff, or any other person, or that he ever admitted that the plaintiff was entitled to any thing more, or any further benefit than what he derived under the article given to him by the defendant. Also denied that the plaintiff had confined his improvements to the said east half, but had cleared about one hundred and thirty, or one hundred and forty acres of the four hundred so adjoining, &c., and believed that the plaintiff and Sullivan had stated to certain persons, that the plaintiff had no interest in or to the said east half, after the expiration of the said twenty-one years; that before King's College sold to the defendant, every opportunity was afforded the plaintiff to show his title, if any, beyond what was expressed in the said instrument, and submitted that the plaintiff had no equity for relief, prayed, &c.

A motion was thereupon made to dissolve the injunction, &c., and on the motion coming on before his honour the Vice-Chancellor, it was contended by

*Esten*, for the plaintiff. That the answer clearly admitted that both Sullivan and the plaintiff were assignees of the east half of the lot, and as such, entitled to the benefit of the covenant for renewal, and also in effect admitted a custom to sell, to present or former lessees, and that the defendant purchased under that custom, and as being the lessee of the entire lot. Now, if a lessee who had assigned, were to represent to the lessor, that he still held the lease, and thereby obtain a renewal of it, he would be declared a trustee for the assignee. Here it may be said, the defendant did not consider this an assignment, and was not aware that he was purchasing under a custom; in this case, however, there was mistake, which would be as much a ground for relief as fraud, and mistake to which the defendant had (perhaps innocently) contributed. However, if he did not refer his purchase to the custom, he did to the covenant for renewal,

to the benefit of which the plaintiff was as much entitled, as to that of the custom ; moreover, he evidently knew of the existence of such a custom, which alone could account for King's College having afforded to the plaintiff an opportunity of shewing his title, &c. There is therefore shown—the lease—the assignment—the custom—the intention to pursue it in this particular instance, and that the defendant obtained the benefit of it, by representing himself as the lessee of the whole, either through mistake, or mistake mixed with fraud, which is more probable ; under such circumstances relief cannot be withheld.

The cases establish this principle—that where an interest exists, which by virtue of some right incidental to it, is susceptible of enlargement, so that the future interest is continued in embryo in the present interest, and the present interest is subject to trusts, or has been parted with, and the future interest is acquired under such right by the trustee, in whole or in part, or the former owner of the present interest, upon an untrue representation that he continues the owner of it, the new interest is held in trust for the other owners of the former interest, wholly or in part, or for the present owner of the former interest. Here the former owner had parted with his interest *quoad hoc*, and acquired the new interest upon an untrue or erroneous representation, (no matter which) that he continued to own what he had parted with, by virtue of the privilege—the case is therefore within Mr. Butter's 1st class of cases on this head.

It may be doubted whether in every case where the new interest springs from the old, it will not enure to the same ends without either fraud or customary privilege, because it is to be considered as in fact sold or given to the owners of the old interest, and certainly where it is obtained upon an untrue representation that the applicant continues the owner of the old interest, that effect will follow. Here all the requisites concur—for not only does the old interest produce the new, and is such new interest obtained upon an untrue or incorrect representation that the old interest continued to belong to the applicant, but a customary privilege enters into the case which shows that the new interest was “in the con-



"templation of the parties," and was in fact prospectively bought and sold when the east half was. This case is, therefore, distinguishable from *Randall v. Russell*, and *Hardman v. Johnston*, in the essential point in which they were supposed to be defective.

The instrument executed by the defendant operated as an assignment notwithstanding the reservation of rent—*Platt* 489; *Palmer v. Edwards*, 1 Doug. 187n.; *Chancellor v. Poole*, 2 Doug., 764; *Rawe v. Chichester*, Amb. 715. And being assignee, plaintiff was entitled to the benefit of the covenant for renewal, as such covenant runs with the land without assignees being named—*Platt* 470.

*B.uke*, for the plaintiff. Considered that upon such a statement of facts as set forth it was not necessary to argue as to the existence of equity in the bill.

The defendant seems here to have thought it unnecessary to deny the equity or custom, but depends entirely on his legal right to renew, and that the plaintiff had no interest other than a lease for twenty-one years. I contend, however, that under the lease, as the defendant calls it, to plaintiff, he had a right to the covenant to renew; and clearly, also, any benefit to be derived from the alleged custom. I conceive that the chief question is, do the circumstances of this case show sufficient to entitle *McVean* to apply for a renewal of the lease for his half of the lot. Leasing the whole of a term is an assignment of the estate, and carries with it all such covenants as run with the land. *Palmer v. Edwards* is clear to this point, and there a right to distrain, and of re-entry in case of non-payment of rent, was reserved.

The facts then of this case are briefly these:—a lease is taken by the defendant—an assignment is made to plaintiff the custom of the Government, and likewise of the college is alleged and not denied, and the application of the plaintiff to purchase is stated, therefore we contend that the defendant is our trustee as to the east half of the lot.

Your Honour will, therefore, hesitate before dissolving the injunction, as the only advantage that could be gained by so doing, would be to enable the defendant to take possession of the property now, instead of waiting until the hearing.

Cases cited on the part of the plaintiff.—Hardman v. Johnston, 3 Mer. 347; Butler's Co. L. 296 b. n. b. Pl. 11; Chambers on Leases, 387; Vandervoort v. Weaver, in this court; Comyn's Landlord and Tenant, 51; Parmenter v. Webster, 8 Taunt. 596; Twynam v. Pickard, 2 B. & A. 105, Platt 251; Simpson v. Clayton, 4 Bing. N. C. 758, 773, 4, 80, & 81; Mulvaney v. Dillon, 1 B. & B. 409; Eyre v. Dolphin, 2 B. & B. 290; Randall v. Russell, 3 Mer. 190; Winslow v. Tighe, 2 B. & B. 195

*Burns*, (with whom was *Bell*) for the defendant. The question that arises here is, was the defendant justified, or had he a right to obtain the fee simple of the lot from the college. A practice it is admitted has existed in the offices of giving a pre-emption to lessees, but even then, such custom would operate in favour of the defendant. But although the custom existed while it remained Crown lands, yet the transfer thereof to the college was free from any such custom. If the land had been sold to an individual instead of a corporation, surely it would not for a moment be contended, that such a sale would be made upon any conditions, or subject to such custom. The bill shows that the Crown had parted with the land, without showing that any conditions were annexed.

In *Black v. Thompson* (in this court,) a lease had been assigned to the defendant as security, who purchased the fee from the college, and upon a bill being filed to have him declared a trustee, the same was dismissed on the authority of *Randall v. Russell*.

The paper executed by the defendant is expressly limited in giving plaintiff the land for twenty-one years, by paying yearly, &c., not to Government, but to the defendant himself. It is admitted that if the plaintiff had been an assignee, he would be entitled to the benefit of the covenants, &c.

Before a decision can be made in favour of the plaintiff it must be shown that the defendant transferred something beyond the twenty-one years, and that the defendant had purchased in fraud of such title of the plaintiff, before he can be decreed to be a trustee.

Motion to dissolve injunction refused.—*Costs to be costs in the cause.*

FRIDAY, APRIL 3RD, 1845.

VERNON V. KINZIE.  
PRACTICE—INJUNCTION—RECEIVER.

The court will grant an order for an injunction to retain a trustee from interfering with the trust estate, where fraud is charged, and by the same order direct the appointment of receiver.

The bill filed stated to the effect that the defendants had been appointed trustees of certain lands by deed executed by one Kinzie, the father of one of the present defendants, who had since died, and after his decease his children, who were the cestuique trust, had amongst themselves agreed to a division of the property; the trustees having refused to convey according to such agreement, a bill was filed to compel them to do so, after which they sold the premises in question at a price, as was alleged, much below their value, and had attempted to take forcible possession of the lands. No answer had been put in by either of the defendants.

*Harrison*, Q. C., for plaintiffs, now moved for an injunction to restrain the defendants from interfering in any way with the trust estate, and that a receiver of the rents, &c., might be appointed.

*Ramsay*, for defendants, cited *Lawson v. Morgan*, 1 Price, 303, to show that the court would not in the same motion grant an order for an injunction and the appointment of receiver.

*Harrison*, Q. C., in reply.—The only effect of moving for the injunction and receiver separately, would be increasing the expense to the parties, and the court will not countenance any unnecessary expense to suitors. An anonymous case in 12 Ves. 5, shows that a receiver will be appointed before answer filed, and when the court sees such facts in the case as to induce it to grant the injunction, it is submitted that for the purpose of securing the rents of the estate for the benefit of those interested, a receiver will also be appointed, as it cannot by any possibility work an injury to the defendants.

THE VICE-CHANCELLOR.—Could see no objection to the motion being granted.

*Motion granted, the costs of injunction to be costs in the cause, those of the receiver to be reserved till the hearing.*

FRIDAY, APRIL 3RD, 1845.

## MASSON V. ROBLIN.

## COSTS—MORTGAGOR AND MORTGAGEE.

Where a mortgagee sells or otherwise disposes of his mortgage security, and at the time of his doing so he is aware that the mortgagor has parted with any interest he had held in the premises, he is bound to communicate that information to the party to whom he assigns, otherwise in the event of such assignee filing a bill to foreclose against the mortgagor, who disclaims any interest in the property, the mortgagee will be bound to pay the costs of the mortgagor, notwithstanding he may have been retained as a party to the suit until the hearing.

It appeared from the pleadings in this case, that the defendant Roblin had mortgaged certain premises, and at the same time gave his notes of hand for the amount of the mortgage to the defendant Armstrong, and had afterwards sold his equity of redemption to the defendant Chamberlain, which fact Armstrong had been made aware of, and had treated with Chamberlain as the owner of the equity of redemption. Subsequently Armstrong assigned by way of mortgage to the plaintiffs the mortgage he held, as security for certain demands they had against him, and at the same time endorsed over the notes of Roblin, but did not communicate the fact of Roblin's having sold his interest to Chamberlain.

Default having been made by Armstrong as regarding his debt to Masson, a bill of foreclosure was filed against him and Roblin; Roblin disclaimed stating the sale of the equity of redemption as above, whereupon the plaintiffs amended their bill, and made Chamberlain a party.

At the hearing, the Vice-Chancellor referred it to the master to enquire what was due for principal, interest, and costs upon the mortgage from Roblin to Armstrong, and also upon the assignment thereof from Armstrong to the plaintiffs, and on this day directed the usual order of foreclosure to be made, the costs of Roblin to be paid by the defendant Armstrong, as he was bound to have communicated the fact of Roblin having disposed of his interest to Chamberlain when he assigned the mortgage from Roblin, and such information not having been communicated to Masson, it was to be presumed that Roblin still held the equity of redemption, the more particularly as Armstrong had still retained the notes given by him, and had endorsed them over to the plaintiffs.



TUESDAY, 12TH MAY, 1846.

## HALL v. GREEN.

## PRACTICE—DISMISSING BILL.

A defendant is entitled to an order to dismiss the plaintiff's bill notwithstanding the death of a co-defendant.

This was a bill filed by Hall and others, against Green and several other defendants, for the purpose of winding up the affairs of a private banking establishment, called "The Newcastle District Loan Company." Several of the defendants had answered, since which one of the defendants had died, and upwards of a year had elapsed without the plaintiff having taken any further proceedings in the suit.

*Mowat*, for Joseph Scobell, one of the surviving defendants who had answered, now moved for the usual order to dismiss as against him, and cited 3 Danl., 205; *Adamson v. Hall*, T. & R., 258; *Chichester v. Hunter*, 3 Beav. 491; *Canham v. Vincent*, 6 Jur., 206; *Tenant v. Storer*, 7 Jur. 526.

The ground for this defendant making the present motion is, that by the death of one of the defendants the suit is abated, for it is submitted there cannot be any difference (as to the effects upon a suit), between the death of a plaintiff and a defendant, and the cases cited show that the court is in the constant practice of granting this order during the abatement of a suit, if under all the circumstances of the case it is a proper order to be made.

*Gwynne*, contra. This is a simple point of practice, and to decide it, it is only necessary to ascertain what the usual course of procedure according to the practice laid down in the book is, in such a case as the present. I submit there is the greatest difference between the death of a plaintiff and a defendant as to the effects they have upon the proceedings of a suit in this court; also between death and bankruptcy; the defendant is never entitled to an order for dismissing the plaintiff's bill, unless it be in the power of the plaintiff to proceed; in the present case the plaintiffs are not aware, nor does the notice state, who the personal representatives are if there be any. The motion ought to be simply one requiring the plaintiff to bring the personal representatives of the



deceased defendant before the court within a limited time, or else that the bill should be dismissed ; and can, it is submitted, only be made by the executors of the party deceased ; here all the defendants are accounting parties, and the plaintiffs cannot proceed in the absence of the representatives of the deceased defendant, and as they are ignorant of the persons bearing that character they are unable to proceed. In 1 Daniel 785, all the cases cited on the other side are collected and remarked upon, but in all it was the case of the death or bankruptcy of one of several plaintiffs. Under all the circumstances, the order, if granted, it is submitted, ought to be granted without costs. 1 Daniel 787-8; 1 Smith 326-7 & 512 were also cited.

*Mowat*, in reply. It is not contended that the abatement of the suit prevents the court from making the order, but a distinction is attempted to be drawn between the case of the death of a co-plaintiff, and that of a co-defendant, and it is argued that the plaintiffs are unable to proceed for want of knowing who the executor or other personal representative is, if there be any such. There is no such distinction as that contended for in this case, nor is the objection pointed out, such as cannot be removed. A plaintiff has a right to take out letters of administration to the estate of a co-plaintiff, and in this case the plaintiffs can, if they desire it, obtain letters of administration *ad litem*, to the estate of the deceased defendant. The defendant, in giving notice of this motion, is not required to show who are the representatives of the deceased ; the plaintiffs must seek them out and revive at their peril, and if there be none, the course as already stated which they should pursue, is clear. The plaintiff on filing a bill assumes all risks as regards death, &c., and unless he chooses to proceed, there is no authority for denying the defendants, who have answered their costs. If the position assumed by the plaintiffs be correct, a suit might be tied up for ever, and the court, it is contended, will not permit a plaintiff to keep a suit thus hanging over the heads of defendants.

THE VICE-CHANCELLOR.—The only notice necessary for this defendant to have given up this motion, was the usual

one to dismiss for want of prosecution, the terms of making the personal representatives parties within a limited time being those usually imposed by the court upon the plaintiff, when he desires to proceed; the second part of the notice served in this case was therefore unnecessary, and I view this case in the light of a common motion to dismiss, and which every defendant has, according to the well established practice of this court, a right to make. In this case, however, it has been strenuously contended on the part of the plaintiffs that, owing to the death of one of the defendants, and the plaintiffs' ignorance of his personal representatives, they have been and still are unable to revive, and that therefore if the order be granted at all, it must be without costs; neither of these reasons is sufficient to induce the court to make such an order; a plaintiff when he institutes proceedings in this court, does so at his own peril, and no matter how numerous the defendants may be, he assumes all the risk of the abatement of the suit by death or otherwise. And if a defendant dies intestate and no person will administer to the estate, the every day practice is for the plaintiff to obtain administration *ad litem*. Upon reviewing the several cases cited, and after the best consideration I have been able to give the question, I am clearly of opinion that the defendant making this motion is entitled to obtain the order, unless the plaintiffs should desire a reasonable time to bring the representatives of the deceased defendant before the court; but as I understand that is not desired, I must grant the order to dismiss the bill as against the defendant Scobell, with costs.

## ON THE PRINCIPLE OF ADVOCACY AS DEVELOPED IN THE PRACTICE OF THE BAR.\*

If we are induced by the attacks on the profession of the bar, with which some of the weekly and monthly journals have recently teemed, to consider at this time, the principles by which it is governed, and the courses of practice which it sanctions, we are actuated by no desire to renew animosities which we trust have subsided. The morality of the bar is precisely the same as it was before it incurred the displeasure which has animated the invectives which have denounced it ; and it is far more important to inquire whether these are just, than to assail the motives or impugn the conduct of those who have urged them. A profession which, far more than any other, holds its course before the public eye, affecting vast interests, and conducing to important issues—whose daily efforts are watched by the just vigilance of the Press, and whose severest struggles have a place in national history, cannot suffer from the reiteration of the bitterest invective unless there is something essentially base *in itself*, which deserves the hatred or contempt of the world before whom it lives. If, therefore, the attacks on the bar had been confined to general vituperation, illustrated by the few examples of the alleged abuse of its powers, which have alone been adduced as evidence against it, we should have been contented to leave its character to the great arbitrament of time. But when the principle of advocacy itself is assailed as immoral, and its habitual practice as that of falsehood, by writers of just reputation and extensive influence, we think it right to meet the general accusation directly by a calm investigation of its merits ; to inquire whether, in truth, our advocacy involves “an inherent baseness ;” to distinguish its honourable exercise from its incidental abuses ; to estimate as well the benefits it confers as the temptations by which it is beset ; and to trace its influences, both on the moral character of those who practice it, and on the society with whose interests and passions it is intimately blended.

The principle of advocacy consists in the substitution of

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\* From the Law Magazine.

persons professing skill and learning in litigated matters for the actual litigants, to do on their behalf and in their stead, all which they might, if gifted with sufficient knowledge and ability, do for themselves, with fairness to their opponents. To the operation of that principle it is a necessary condition that the advocate shall receive such reward for his exertions as may compensate him for the preparatory study and active labour which occupy the prime of life; and it is a condition scarcely less necessary that he should be willing, as a general rule of conduct, to render his professional services without previously deciding on the merits of the cause for which he is retained. We shall have occasion, as we proceed, to illustrate this latter condition, and to consider its just exceptions; at present we state it broadly, as a concession to the opponents of the bar on which they found their principal accusations.

If advocacy, thus explained, shall be proved to be a pursuit of dishonour, the conviction will, at least, be attended with disastrous consequences; for that its existence is indispensable to the administration of justice in this country can scarcely be denied. In the rudest condition of society, unless the power to expose wrong were invariably associated with its endurance, and innocence when accused were always gifted with eloquence to defeat its foe, the party complaining or accused must often plead through the medium of other organs than his own, and find other affections to represent his feelings and his wishes. But in a society like ours, intervened by the ramifications of artificial law, where the tenure of real estate, the operations of commerce, the transmission of property from one generation to another, induce a complicated system,—to require that all men, women, and children who may be involved in litigation, shall plead their own causes or present them only through the medium of unpaid and unskilful friendship, would amount to a practical repeal of all laws, and a resolution of society into its elements. Even in cases which, involving no doubtful matter of law, require only aptitude, presence of mind, and discretion, and in which parties endowed with capacity and courage have appeared as their own advocates, how rare are the instances in which they



have not exemplified the old proverb at a ruinous expense of the time which is the property of the public! Experience has shown that, even in these peculiar cases, the duration of the proceedings has been often increased tenfold without the least practical benefit to the suitor, so as to prove that, if such examples became universal, the result would be, not mere inconvenience to a few devoted judges and juries, but the necessary multiplication of judges to an enormous cost, and an intolerable addition to the duties of juries. To be consistent, therefore, the writers who would uproot the profession of advocacy must seek the destruction of the law itself—not its simplification merely, for that would not avail—not only the destruction of our system of English Law, but the abolition of all law by which the definite rules are applied to the complicated relations and passions and usages of mankind. When, therefore, a writer, like the editor of the *Examiner*, who has always powerfully maintained the inviolability of the rights of property and of national faith, and all whose associations are linked to a high state of civilization, which he illustrates by his wit, and delights or admonishes by his satire, assails the principle of advocacy itself as synonymous with personal falsehood, we are compelled to ask him—whether he believes that any laws adapted to a complex society like that which he adorns, could be administered without the intervention of professional advocates? And if that aid be necessary we would venture to ask, is it the part of wisdom to affix a stigma on the body, not incidental but essential; not on some but on all its members; which once admitted, shall drive from it every man of feeling and honour? Suppose the example which the *Examiner* holds out for imitation—of a barrister who resigned lucrative practice and bright prospects because the practice of the bar was inconsistent with the requisitions of his conscience—universally followed by those whom he admits to be, out of court, among the most honourable and truthful of men, can he estimate the evil which would follow from his success? (a) Instead of the bar comprising

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(a) The following are the entire passages referred to above. They occur at the close of an article in the *Examiner* of the 17th August last:—

“ We are not sorry that the indiscreet conduct of a part of the bar has called



men, who have at least such vigour of personal rectitude as can preserve their private lives from the corruptions of their daily practice, it would consist of persons content to accept infamy for gain, unshakled by rules, and absolved from all the obligations of conscience and honour, as the clan of the Macgregors were said by their fierce Chieftainess, to be "made free by the very brand which left them neither name nor fame." The body thus assoiled from all correcting influences would still possess all the power which is now, for good or evil, intrusted to the bar, for evil only. To the integrity of the bar the most important interests are daily intrusted; and, we fearlessly assert that, with rare and odious exceptions, the trust is faithfully performed. Rules for example, are every day in term granted by the courts on the ex parte statements of counsel, which have direct influences on fortunes of individuals; which, for example, may suspend proceedings till bankruptcy or insolvency intervenes, or an assignment or flight defeats a creditor. In the hurry of *nisi prius*, occasions frequently occur when the misstating or garbling a document, the disingenuous concealment of part of a correspondence so as to give a false effect to the portion produced, a thousand modes of trickery open to an unscrupulous advocate may work irreparable ruin. And in the advice given out of court, the power to excite or discourage litigation, or regulate its course if inevitable, counsel possess large capacities which must exist for good or for evil. Who can estimate the mischief which would be done by excluding from their number all men of pure conscience and high honour, and by leaving the rest free to work evil by representing it as a destiny they are expected to fulfil?

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attention to its morality, which we consider most vicious and mischievous; but we are also quite ready to admit, that the sins of the profession are generally confined to the profession, and that a body of men more honourable and more truthful than the lawyers are out of their courts cannot be found. It is only in the place devoted to the investigation of truth that they are the advocates of falsehood for a guinea; it is only in the very temple of justice that they glory in procuring the triumph of the wrong-doer.

"We are acquainted with one honourable instance of revolt against the professional morality. A gentleman of superior abilities, advanced in his profession, high on his circuit, if not leader of it, and making a handsome fortune, retired, made a sacrifice of all that he had spent half a life in labouring for, because he could not reconcile the licenses of the advocate with his notions of honour, justice, and morality."

If, however, the practice of advocacy can be proved to be inconsistent with personal truth and honour, we grant that the necessity for its continuance should not rescue it from disgrace. Still, the necessity for the continuance of an order whose influences intermingle with an infinite variety of social relations, is a strong presumption that the necessary modes of its action are not wicked ; that Providence, which “shapes our ends, roughhew them how we may,” has rarely, if ever, permitted any thing to be inextricably interlaced with the fibres of our social existence which is essentially evil. A yet stronger presumption in favour of the bar arises from the conceded fact that its members, when not practising their profession, are among the most truthful and honourable of men. A writer of distempered romance may find scope in depicting the moral anomaly of a man stained by some one dark crime, who atones for his secret guilt by exercising the most generous virtues ; but he would scarcely venture to represent even a single human being, the business of whose life is one lie ; who shall exult in the perversion of justice, not merely to the impunity of guilt, but the punishment of innocence, and who shall yet, in social and domestic relations, in the hours of relaxation, repose, sickness and death, be good and just and kind. Still less would he venture to multiply the prodigy by hundreds—to imagine a race of men not devoting to falsehood merely their intellects but their tastes and affections,—ever passionate to do injustice—and yet themselves remaining all the while steady to truth and justice !

Let us, then, follow into detail the application of advocacy to the various classes of opportunity to which it is exerted and inquire, in relation to the requisitions of each, whether its exercise involves the conscious support of falsehood against truth, of injustice against right. The vituperations bestowed on the bar seem generally founded on the assumption not only that all litigated questions involve a direct opposition of truth and falsehood, and with it of justice and oppression, but that the advocate engages in the support of the worse cause with full knowledge of its hollowness, and does a violence to his own convictions for the sake of gain, similar in baseness to that of a philosopher, who should impugn some

important truth revealed to his consciousness with mathematical certainty, or of a politician who should accept the pay of those whom he believes to be the enemies of his country and of mankind, to aid them with the blandishments of his sophistry. A glance at the intellectual and moral position of the advocate in cases dependent on legal argument, where facts are undisputed; in cases where the result depends more or less on the truth or falsehood of allegations of fact; in others, where the result depends not on the truth or falsehood of alleged facts, but on the inferences to be drawn from them; in questions of unliquidated damages, where the result altogether depends on considerations of morality and feeling; and in the conduct and defence of criminal prosecutions, which though involving considerations like those which govern civil litigation, present some points of duty and of danger to the advocate which do not arise in civil proceedings—will better enable us to test the justice of those charges than any general reasonings.

First, then, let us consider the position of an advocate retained to support in argument a legal proposition which his client desires to maintain; with a view to decide whether there is anything in the duty he undertakes, if fairly performed, akin to falsehood or partaking of baseness. In principle, this class of cases would seem most favourable to the objector, because no partial statement of facts, coloured by the passions and the wishes of the litigant, disturbs and sways the judgment of his counsel. Nor, with those frequent exceptions in which he is required to support an opinion formed previously and communicated by himself, (and in which his office is surely beyond all impeachment,) can he enter on his work with the assurance that the proposition he is engaged to maintain ought to prevail. To require such previous mental assent from the advocate would be to invest him not only with powers of a judge—or of any number of judges—but of the highest tribunal in the last resort, before which the question may finally be argued, without the benefit of suggestions from other minds to dispel the errors of a first impression; and would condemn the suitor to take the chance of successive experiments before he could find an advocate with a judgment happily attuned to his purpose. Cases may,

indeed, be presented to a lawyer, which his discrimination may at once perceive to be "too clear for argument;" and in such case his duty is equally clear—to refuse to debase himself, and waste the public time by a vain attempt to distinguish an authority unquestionably in point, or to unsettle a principle of clear application. He will use caution, indeed, before he decides on this course,—recollecting, that sometimes objections, thought too manifestly groundless by learned judges even to be reserved for consideration, have been found valid; as in a recent instance affecting the lives of the seven foreigners convicted of murder at Exeter. The great majority of cases, however, present no such difficulty in their apparent clearness; the position in which they stand for solemn argument alone implies, that, to ordinary legal apprehensions at least, they are doubtful; and the question is, whether they shall be decided by the judges without argument, or—if necessarily to be argued—whether the parties to whom each side of the question is assigned, act wicked and base parts in endeavouring to support the position of their respective clients by authority and reasoning. Surely no one who desires that justice should prevail, would deprive the judges of the aid which they derive from the research and the reasoning of laborious and acute lawyers, presenting in turn each aspect of the case; investigating the principles which should govern it; collecting and explaining the authorities which bear upon it; and suggesting the distinctions and the analogies which must be regarded in each decision if it should not introduce that inconsistency into the system which is the worst of tyrannies. So needful to the due administration of justice in difficult questions is this shifting of their elements by legal minds, sharpened by professional zeal, that in cases of peculiar difficulty and importance—like that to which we have just alluded—the judges desire for their assistance a second argument, conceiving that even the associated experience of all the judges may be aided by such a process. The counsel, then, though *selected* by their respective clients, are really ministers of justice—contributing to the attainment of justice in the particular case by the lights they cast on it—and to the general harmony of the law



of which it will become an example. Up to the height of this position they are bound to act—zealously for their clients, but fairly by the court; and, therefore, the counsel, who in argument, should attempt to suppress or pervert the materials of judgment, as if he should quote a statute as subsisting which he knew to be repealed, or suppress an adverse authority in the hope that it might be overlooked, or wilfully stop short in reading a passage when the residue would weaken his inferences—would betray his higher duty to the court and to justice, and incur the just censure of the bar and of the judges. But is there anything disgraceful in the office of avowedly bringing before the judicial mind all that can be fairly urged on one side of a doubtful question of law? Is any deception practised or endured? Is the mental operation of the reasoner debasing? It is not, indeed, so noble an exercise of the human faculties to explore the labyrinth of any science with the purpose of finding materials for the support of a previously adopted theory, as with the pure and passionless aspiration for abstract truth;—but of the great benefactors of mankind how many have been partisans of theory, how few single-minded seekers after wisdom! Human nature is essentially partisan. Our minds select their favourites on lighter grounds than the confidence in a barrister's talent implied by a retainer; nay, on mere caprice, like that which Wordsworth exemplifies in one of his noblest sonnets, by the adoption of a single ship from a fleet under sail for the peculiar sympathy of the observer:—

“ This ship was nought to me, nor I to her,  
Yet I pursued her with a lover's look,  
This ship to all the rest did I prefer;  
When will she turn and whither?”

Is the noblest literature free from this weakness, so nearly bordering on strength; this partial deception which produces beauty, and, when opposed to the results of congenial but opposite prepossessions, elicits truth? What historian, whom it is possible to read with interest, who is beyond a mere “honest chronicler,” can be named who is not self-retained on behalf of some cause or some idol? Take a late invaluable addition to our materials of just appreciation of the annals of our great civil war and the men whom it produced



—is Mr. Carlyle the advocate of truth or of Cromwell? Did the influence of advocacy ever inspire a more partial view of any cause than this presentment of great men and great events—bending all things by passionate regard to one purpose; shedding on them from a reasoning imagination one colour—depreciating rivals even by the fantastic mockery of nicknames, and subjecting the laws of humanity to the supremacy of individual power—than this heroic pleading? Do we wish it unwritten because it is the work of an advocate rather than a philosopher? Or shall we repudiate all that is beautiful and wise in Burke's *Reflections* because we may suspect that his affections were engaged on behalf of regal suffering by his glimpse of Marie Antoinette, when he beheld her at the Court of Versailles, "glittering like the morning star, full of life, splendour, and joy?" If ever there lived a thinker, desirous of searching after truth with his whole heart, such was the late William Hazlitt; and yet how were his most earnest speculations changed by the noble infection of beauty, until the earnest champion of popular rights found an idol in an emperor who had betrayed and mocked them, and sacrificed all his simpler tastes for a gorgeous picture of intellectual power and romantic success! If there is truth in Shakspeare's assertion that "all the men and women are merely players," it is no less true that all are in turn advocates; and, as the most honest of actors are those who present themselves on the smaller stage, so the least dangerous of all advocacy to the interests of truth is that which is undisguised, of which the price is defined and openly accepted.

Let us follow, then, the retained advocate into the studies which prepare him for the delivery of learned argument on some question arising on the law of real estate. He penetrates the maze of precedents and authorities to search after the leading principle of his subject, and traces its application in the succession of decisions with strenuous care. Dry, hard, and uninteresting as the labour seems, it soon generates its own fervour, and becomes its own reward. The faculties which would else be relaxed and dissipated among various exciting pursuits are braced and strengthened by the silent toil; the very remoteness of the subjects of inquiry from the

ordinary aspects of business imparts a certain elevation and refinement to the study which masters them ; while the habit of continuous exertion, frequently piercing through the accumulated illustrations and distinctions of ages to the same ancient principles of law, though in different directions, invests life itself with the consistency which belongs to singleness of purpose and aim. His progress is not uncheered by reliefs the more welcome as they are laboriously earned ; a sidelong glimpse into English history and ancient manners ; a quaint jest of some judicial reporter in which the stout-hearted writer seems still to live and to enjoy ; some classical allusion redolent of the days of youth, whereby Coke or Hale refreshed themselves as they wrote ; some antique pleantry which breathes a sort of wall-flower perfume from the solid mass which centuries have darkened but have not shaken. Nor let it be thought that the lawyer, whose toils are akin to that of the student of an abstract science, pursues them without the infusion of some warmth of partizanship which, if he begin his researches without bias, or with a distrust of the side on which they are engaged, will soon render him the convert of his own industry, and induce him to hail with satisfaction the conquest of every difficulty and the achievement of every fresh illustration. In this respect, his mental operation resembles that of some high casuist, who has undertaken to establish a favourite theory of history or literature ; who surveys everything by its light, and devotes all the spoils of time to its service ; as when old Jacob Bryant assails the material existence of Troy, or Wolfe or Heyne attacks the personal identity of Homer ; and the process leads to a conviction, strong as that of the knights who surveyed the shield from opposite sides and fought to the death for the aspect each beheld—a conviction which sometimes resists all force of adverse judgment, invites and repels the decision of successive courts, and, at last, serves the House of Lords itself with an air-drawn writ of error returnable before a little, inward, unconquerable tribunal ! Such studies and such reasonings, so far from corrupting or debasing the minds of lawyers who have chiefly pursued them, often preserve a guileless simplicity of character, maintained by few who

mingle largely in the feverish business and pleasures of life. If we take in our time the examples of Holroyd and Littledale, to whom we might add the judge who now fills the seat whence Mr. Justice Littledale bade the profession which he loved farewell, we may safely defy any profession of any age to produce three men from its ranks more truthful, more generous, more gentle; whose minds were more free from perversion: and whose hearts had been kept more purely "unspotted from the world."

Let us next observe the moral position of the advocate in cases of disputed fact, of which it is impossible for him to ascertain the truth before he accepts the retainer, unless, indeed, he could summon all the witnesses, sift their evidence and anticipate every aspect the case may assume when tried before a jury. He reads his brief; he may possibly find there grounds to believe that his client has no cause of action or ground of defence, and, if so, he will, if he acts rightly, take the earliest opportunity of expressing his opinion, and if expenses can be yet saved, of urging a withdrawal or a compromise; and if neither can be obtained, he will, if for the plaintiff, make a fair statement of the case in the true aspect in which he has discerned it, and let it meet its doom as speedily as it can; or, if for a defendant, will content himself with watching and scrutinizing the plaintiff's proofs precisely as the judge himself does when no counsel appears for the defence. But the unprofessional reader may be assured that of cases seriously litigated those which call for this exercise of duty are comparatively rare. If he puts his reliance on such statements of a barrister's practice as "the aim of their lives is to wrest the law to the purposes of well-paying clients and defeat justice," "their tongues being ready for any hirers and wrong-doers requiring their assistance, while the innocent and oppressed rely on their own integrity, by far the larger half of the bar will always be agents and instruments of wrong doing," "it is only in the temple of justice that they glory in procuring the triumph of the wrong-doer"—he must suppose that it is the habit of clients to stand confessed, before their counsel, wrong-doers and oppressors; that they avow even in their own statements

that they have suborned witnesses to promote a case of falsehood at the risk of ruinous costs ; or that, if the avowal is not made in terms, the injustice of the attempt is so obvious on the face of the instructions, that the advocate will at once understand that he may prepare for the enjoyment of that which is alleged to be his pleasure as well as his business—the becoming an accomplice in triumphant villany. It requires no witness but human nature to prove the impossibility of this charge. Before the client can state his own case with this most amazing candour, even to his attorney, in order that his attorney may present it through as pellucid a medium to his counsel, he must, at least, perceive it himself in its naked baseness. Did this *ever* happen ? There may, indeed, be cases dependent on the truth or falsehood of a single fact which must be known to the principle, as the genuineness or forgery of a signature alleged to be his own ; but even then palliations and excuses, suggestions utterly false or partially true, of some moral considerations which half excuse the fraud, rise up between the conscience and the sin, and embolden him to mislead, not only his counsel, but his attorney (a). In such cases, do the assailants of the bar believe that a confession of the intended fraud and perjury *ever* found its way into a brief ; or do they really think that if it did, or statements leading directly to the same conclusion were found there, *any counsel* would become the instrument of uttering as genuine what he knew to be forged ? But the cases which depend upon facts of this stubborn nature are comparatively few. In many cases the client himself is only acquainted with the circumstances of his own case through the medium

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(a) It is well known by the members of that branch of the profession which comes in immediate contact with the parties, how difficult it is to prevail on them to disclose any facts they deem unfavourable to their cases, although the disclosure is of the greatest importance to their own interests. A curious instance of this hardihood in concealing unfavourable facts occurred many years ago on the Home Circuit in an ejectment brought by a female to recover one of the Angel estates. Before entering on proof of a long and intricate pedigree which her counsel, Mr. Adolphus, had opened, the late Mr. Gurney, who was counsel for the defendants, offered to prove a fact, which, if true, would put an end to the action at once—that the lessor of the plaintiff, who claimed to be sole heiress, had two brothers living, one of whom was in court. Mr. Adolphus assented—the fact was proved—and, on the lady being asked whether she had communicated the fact to her attorney, replied, “To be sure not : do you take me for a fool ? Why, he could not have undertaken the case if I had told him that.”



of other minds, of servants or other agents at a distance, all more or less disturbed by interest or coloured by prejudice ; and, in more, his own perceptions are moulded by his resentments or his wishes.

It is matter of curious observation, how any event, which is shared, or witnessed merely, in a state of hurry or excitement, presents different and even opposite aspects to the memory, and how a bias, from some almost or wholly imperceptible cause, converts spectators, who are without interest and above suspicion, into partisan witnesses. Such is almost every case of litigated collision by land or water ; in which it is usual to find both bystanders and passengers differing, not only on the looser points of sobriety and speed, but on such matters of direct opposition, as on which side of the road or river each carriage or vessel was proceeding, and even on which side of a carriage or vessel a blow was struck. If such differences arise in the recollection of impartial persons, surely it cannot be surprising that each party is confident that he is injured, and communicates his case, in that confidence to his counsel. The result is, that, with the exception of cases admitted to be without defence, and committed to counsel merely to watch the proofs of the adversary, and cases in which no struggle is anticipated on the facts, but their legal application alone is disputed, or technical objections are suggested, the statement presented to counsel is almost always such as to induce a strong belief in the justice of the cause, and to enlist his feelings powerfully in its success. To one thus prepossessed, who can wonder that in the animation of the contest, the first impression is deepened ; and as the little chapter of life, with all its living interest, opens around him, his client's case becomes part of his own being ; that his belief in its justice insensibly but inseparably blends with his natural desire to succeed ; and that he hears all the arguments and regards all the testimony against it with the surprise, dislike, and incredulity of inveterate opinion, sharpened by zeal. The irregularities which counsel sometimes commit, when betrayed into conversational attacks on each other, and the petulence with which they occasionally treat opposing witnesses,—faults



often to be severely censured, and always to be deplored,—generally arise from the excess of this conviction, and the irritation consequent on an attempt to defeat it. No counsel who regards the interest of his client, or his own duty to justice, will ever cross-examine with deliberate severity a witness whom he does not believe, for the time at least, to be swearing falsely; still less will he condescend to the more insidious art of inducing the witness to answer with one meaning, and assume his reply to bear another, and thus lead him to give evidence which, intended to be true, shall have the effect of falsehood—a species of criminal trickery nearly allied to guilt of the deepest die. In commenting on the testimony of witnesses he will never indulge in attacks which he does not believe to be deserved, and which he does not also deem essential to the just result of the cause; remembering that witnesses do not, like the parties, come voluntarily before the court, and are not, like them, represented by counsel; but if the evidence has important bearing upon the result, and he believes it untrue, he is bound to deal with it as false, though the imputation of perjury may thus be cast on one who has no present means of repelling it. Unless the cross-examination, which may (though we believe very rarely) succeed in developing premeditated falsehood, and the remarks which, supplied by surrounding circumstances, may lead to its disbelief, were not fearlessly administered by counsel, trial by jury would be divested of its most valuable characteristics, which surely consist less in the enforced unanimity of twelve men, than in the public investigation of evidence, conducted by the vigilant scrutiny of conflicting minds (a). To avoid all harsh remark

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(a) The sentence of the recent Court-Martial on Lieutenant Hyder supplies a curious example of the injustice with which counsel are sometimes assailed for their remarks on witnesses. the court acquit the prisoner, but “cannot refrain from animadverting in the strongest terms of disapprobation on the violent, coarse, and uncalled-for language which the prisoner had recourse to in his defence, in allusion to the character of a witness named. The masterly defence written for Lieutenant Hyder by his counsel, Mr. Warren, undoubtedly assails in vigorous and indignant language the evidence of the witness referred to; and if that witness had been one whose testimony was not essential to the charge, the censure would have been just; but the evidence was such as, *if believed*, proved the offence charged; *if rejected*, left it without a tittle of proof. How, then, could the officer accused, asserting his innocence, be defended at all, except by impugning the veracity of this witness? All the surrounding circumstances, every argument, whether drawn directly from his conduct, or from

as far as possible, to reconcile opposing testimony by any theory rather than that of wilful falsehood, and never to impute it unless in the full belief that it has been committed is the wisdom no less than the duty of the advocate, as it was the practice of the greatest of all advocates of our time, the late Lord Abinger. As the vehemence of counsel is justified by the strong belief they imbibe that the cause they maintain is just, so they are bound to conduct it as befits an honest cause, leaving the consequence of its falsehood to fall on the client who has deceived them. Although not bound to state or prove the case of an adversary, they are bound, if they anticipate it, to do so fairly ; to state the entire material effect of an instrument ; to produce no document with the hope of raising an impression they believe to be untrue, by the ambiguity of its language ; to garble nothing ; to conceal nothing ; to misrepresent nothing ; but to present every argument and illustration which the zeal of the most earnest friendship could urge, and which are rarely urged with powerful effect unless in the conviction that they are urged for justice. As the zeal of an honourable advocate during the progress of a cause is in proportion to the confidence he feels in its merits, so we believe that the continuance of that confidence, or its overthrow, determines the feeling with which he regards the issue. He often remains unconvinced, though conquered ; but we venture to assert that the only regret beyond the disappointment of an excited moment, which he feels, arises from an impatience of a failure of justice, mingled often with vain regrets for the insufficiency of his own exertions ; and that the only permanent feeling of pleasure he cherishes in success, is nurtured by the consciousness that right has been done by his victory. That there are instances in which the pride of intellect, in its unhallowed vivacity, may, at the Bar, as in other spheres of action, exult in the triumph of evil, or in a heartless indifference to evil and good,

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other sources, tended to one conclusion, that the statement he had made on oath was untrue. The Court-Martial (whether rightly or wrongly it is not our province to decide) find that it was untrue, or at least that they could not rely on it as true, by finding the prisoner not guilty ; and if Lieutenant Hyder felt it to be so, as he asserted by his own lips, though in the language of Mr. Warren, was he not entitled to argue that which his judges have found, by the aid of the very defence they thus impugn ?

we do not deny ; but that a disposition to glory in the success of wrong, is a general characteristic of the English Bar, we do solemnly deny ; and we esteem the charge so utterly groundless, that freely acquitting those who have urged it of intentional falsehood, we can only regard it as a proof of the force of bias in disturbing the aspects of truth, which not only influence barristers, but all men who reason through the medium of the prejudices or the affections.

If we have afforded a glimpse of the manner in which counsel may be honestly engaged in each side of a cause dependent on disputed facts, where there is a direct opposition of truth and falsehood, and the result lies in their development, we may approach with confidence those far more numerous cases in which no such antagonism prevails. Of this character cases of circumstantial evidence partially partake, where the circumstances are admitted to be true, and the question involves only the inference which the jury should derive from them. If, in reference to these cases, we consider what a strong tendency there is in every mind, however disinterested, to weave for itself a theory out of the minute incidents which surround a transaction, itself shrouded in mystery, and to bend everything to its purpose—a disposition requiring to be checked by the strongest vigilance of juries in trying charges of secret crime—we shall not wonder that counsel, having been assured of the fact itself by his client as he desires to establish it, should find in everything a tendency to prove it true. In such cases, however, there is an ultimate question of truth and falsehood, though depending not on the verity of evidence, but on the strength of inferences ; but there are many others which are questions of judgment, of science, of skill—questions of degree, not of opposition—which engage all the accomplishments which the advocate may happen to possess in literature, science, or art. Such are questions of copyright and patent, when the contest is whether the work for which protection is sought, has such originality as to deserve it ; whether an alleged imitator has sought to monopolise a principle, or only a new mode of application ; how far similarities are indicative of piracies ; what steps and gradations of improvement can

be withheld from public endeavour for private recompense ; which are not questions involving truth or falsehood, but matters of skill, on which an ingenious mind, having once received its cue, will proceed with increasing ardour, and bring to unskilled judges and juries the most important aid. Thus, when rights alleged to have been acquired by prescription or user are questioned, and acts of enjoyment are proved on the one side, met by proofs of interruption on the other, the mind has only to estimate a question of degree, and will decide on a mere balance of admitted facts according to its own tendency. Thus, in the most interesting of all questions which engage the powers and affections of an advocate—questions of mental competency to perform important acts—which involve the highest moral considerations—which border on the most affecting solemnities of life and death and render “metaphysical aid” far more needful than skill in analyzing evidence, not the ordinary prepossessions merely are enlisted in the cause by the first view presented ; but the highest faculties, the noblest prejudices, the finest trains of speculative thought, all find delighted exercise in the vivid operations of the mind thus awakened from its languor and impelled along the course of profound and subtle inquiry. In these contests, particular facts may be disputed ; the wish of a witness will sometimes be “father to the thought,” and circumstances will be confused by the affections ; but the result will rather depend on philosophical inference applied to the affairs of life, than on the veracity of witnesses. The celebrated cause, “Doe on the demise of Tatham v. Wright,” in which the title of the estate of Hornby Castle, in Lancashire, depended on the validity of the will of Mr. Marsden, which was, after two successive verdicts in its favour, ultimately set aside, supplies a signal example of this position. In support of the will, which was elaborately prepared by a solicitor of high character, it was proved that the testator had lived to the verge of old age, apparently at the head of a liberal establishment, entertaining guests with courtesy—that he had bought, sold, exchanged, and mortgaged largely—that he had executed a great number of deeds, attested by witnesses of unblemished honour—and that he had corresponded with



numerous persons in different periods of his life by letters, which, if the genuine products of his own mind, could leave no doubt of his competency ; and had partaken of the holiest rites of religious worship. On the other hand, it was alleged that being a person of feeble understanding never developed beyond the state of ordinary childhood, he had been all his lifetime in bondage—the puppet and the slave of his steward, whose family, engaged with their father in a conspiracy for years to acquire dominion over his estate, had contrived to present him to casual acquaintances and guests in favourable aspects—to engage him in various matters of business, and really to guide him in all—nay, to write for him the letters he was to copy, and which were in due season to be adduced as evidence in support of final dispositions made under their control. This case also was sustained by a great body of proof consisting of instances of great debility of intellect, and of base subjection to his inferiors, extending over many years, and strong grounds were suggested, as apparent in his letters, to indicate that they were not the unaided productions of his mind. The facts of both cases were probably true in the main, notwithstanding some natural mistakes and exaggerations—the truth probably lying between both theories—and the real question resolving itself, into that which the law must leave as much to the feelings as the reason of juries—what degree of intellect and will should suffice to give validity to a solemn act, disposing of property which the owner can no longer enjoy ? Surely it can never be said, that in cases of this nature—and those akin to them, as cases of life insurance—the counsel, who survey the intellectual or physical history of a life from the aspect presented by each side, and who struggle for the success of a theory to which they become impassionately devoted, deserve to be branded as “liars !” In questions of character again, involving the import and effect of words spoken or written, and sometimes contrasting the inevitable mischief accruing to individual reputation with the supposed duty of the utterer,—questions in which the noble office of law in protecting as substantial property the impressions wrought on men’s minds by individual conduct—the breathing fragrance of life—is regarded



with reference to the exigencies of society which may require an individual sacrifice—the office of the advocate on either side is surely neither deceptive nor ignoble. In questions of the amount of unliquidated damages, the counsel, who pictures the wrong to be compensated, and he who suggests the grounds of mitigation, may not only both be honest, but both right—each taking his own share in presenting the truth, so far as it can be elicited, to the minds of the jury—the extent of wrong on the one side, the just allowances for human frailty on the other.

But stress is laid on the circumstance, that the barrister, however honourably he may advocate his client's cause when he has embraced it, is *paid* for his services, and that the side on which he is engaged is determined by the chance of a retainer. For the purpose of opprobrium the payment is indicated by the word “hired,” the profession is denominated “a trade,” and terms of abuse are fast accumulated on those associated terms. It is to be regretted, that when “through all the employments of life each neighbour abuses his brother,” we do not, at least, abstain from imputing as disgraceful that which is common, nay, necessary, to all. To receive pecuniary remuneration for labour which, even if beyond all price, occupies the active hours of life, is generally an essential condition of the noblest services which man can render to his fellow and the world. If to receive payment for that which is divinest in literature, most exquisite in art, most ingenious and useful in science, be disgraceful, aristocracy would have a monopoly it has never aimed at, and “regal and noble authors,” artists and philosophers alone would adorn the world. Since the first of all authorities in periodical literature, Christopher North laid down the axiom, “An unpaid contributor is an ass,” we may, without offence, assume that the very articles in which the Bar is stigmatized as *hired*, are written by gentlemen who live by the labour of the mind. The soldier who volunteers to lead the forlorn hope is entitled to his day's pay; and our last true moral hero, Sydney Bernard, entered the fatal vessel as a paid surgeon. It is not the pay, but the subordination of the duty to the pay, that makes

the accusation just—when the duty is performed in the spirit of money, without nobler aims and inspirations. None can be more sensible than we are, that the great sin of our age and country is the homage paid to wealth, or that there are instances at the Bar in which the pleasure of its acquisition has beguiled the successful practitioner from the proper contemplation of his higher functions; but generally speaking, we believe barristers are as little mercenary as the members of other professions. We would not insist on the honorary character of their fees as creating an essential difference in their favour from others whose remuneration is matter of contract (*a*), except so far as it may afford the opportunity of ascertaining how far their zeal is dependent on the amount of their pecuniary reward. Within certain limitations, prescribed by professional etiquette to prevent unseemly tenders of advocacy, the attorney fixes the remuneration of the counsel at his pleasure; and we appeal to all experience, whether, when once counsel are fairly engaged in the cause, all considerations of the direct reward are not lost in the ardour of the contest, and whether even a pauper's cause is not as earnestly maintained as if it were that of a nobleman or of the crown. The poor cottager Punter had as zealous an advocate as Lord Grantley in their two memorable trials on the Home Circuit; and assuredly that excellent advocate did not find the sympathy of his brethren of the Bar on the side of rank and power.

*To be continued.*

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(*a*) "I shall be sorry," said the late Mr. Coleridge, "to see the honorary character of the fees of barristers and physicians done away with. Though it seems to be a shadowy distinction, yet I believe it to be beneficial in effect. It contributes to preserve the idea of profession, of a class which belongs to the public, in the employment and remuneration of which no law interferes, but the citizen acts as he likes, *foro conscientie*." Table talk, Vol. 2.

# THE UPPER CANADA JURIST.

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## UPPER CANADA REPORTS. OLD SERIES.

*(Commencing from the end of Mr. Draper's Volume of Printed Reports.)*

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### QUEEN'S BENCH.

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CASES DETERMINED IN TRINITY TERM, 1 AND 2 WILL. IV.

#### SHORE V. SHORE ET AL.

To trespass for assault and battery and wounding plaintiff and biting off his fingers, and common assault, against two defendants; the general issue was pleaded by both jointly, and they severed in their pleas of justification. 1st plea by one defendant, molliter manus imposuit to preserve the peace, plaintiff and the other defendant being fighting. To 1st count, 1st plea the same, and plaintiff disturbing family, &c. Plea by another defendant to 1st count son assault demesne. Special demurrer to all the pleas, that defendants had jointly negatived the assault and battery, and by their pleas they attempted to justify the same separately. Special causes overruled, but 1st and 2nd pleas bad, mollitur manus imposuit being no answer to the declaration, and 4th plea good as an answer; if there was any excess the plaintiff should have new assigned.

Trespass for an assault and battery by both defendants. Declaration contained two counts; in the first it was charged by way of aggravation that defendants tore and damaged plaintiff's clothes, and with their teeth bit and wounded him, whereby he lost some of his fingers, &c., which were amputated in consequence. The second count was for a common assault only. The defendants joined in pleading the general issue to the whole declaration. For further plea to the first count the defendant Andrew pleads that as to the assaulting, beating, and ill treating of the plaintiff, as in the first count mentioned, the plaintiff ought not to maintain his action against him, because he avers that he, Andrew, was possessed of a dwelling house, that plaintiff came into it with force, &c. and disturbed him and his family, and assaulted and beat and wounded the said John, (the other defendant) whereupon the said John struck him (the plaintiff), and for the preservation of peace, and that they might do no hurt to each other he, Andrew, gently laid his hands upon the plaintiff as he

lawfully might for the cause aforesaid, which are the assaulting, beating, and illtreating the said plaintiff in the said first count mentioned.

And for a further plea as to the assaulting, beating, and illtreating the said plaintiff as in the said first count mentioned, the said Andrew says *actio non*, because the plaintiff and the said John were fighting together and striving to wound each other, whereupon he, Andrew, being present for the preservation of the peace, and in order to separate, &c., gently laid his hands upon the plaintiff, as he lawfully might for the cause aforesaid, which are the assaulting, beating, and illtreating the said plaintiff in the said first count mentioned.

The defendant John pleads as to the assaulting, beating, bruising, wounding, and illtreating in the first count mentioned, and as to the tearing, damaging, &c., the wearing apparel as in that count mentioned, *son assault demesne*, admitting that in his own defence he did a little beat, bruise, wound, and illtreat the plaintiff, and tear, damage, and spoil his wearing apparel, &c., doing no unnecessary damage on the occasion aforesaid.

Demurrer to the two special pleas pleaded by Andrew, assigning for cause that he having jointly with John wholly negatived (by the general issue) the charges against John and himself jointly, attempts by these pleas to put in issue and justify the matters in the first count as if they were alleged against himself alone, and not against him and John jointly; and also that by these two pleas, the defendant Andrew, only attempts to justify the assaulting, beating, and illtreating in the first count mentioned, when there are other and several allegations in that count not answered by the said pleas.

Demurrer also to the special plea put in by John, assigning for cause that he, John, having jointly with the other defendant wholly denied the allegations against them jointly, by his special plea severally attempts to justify and put in issue only a portion of the allegation in the first count contained, that is the assaulting, wounding and illtreating, and the tearing, damaging, and spoiling the wearing apparel in the first count mentioned, where there are various other allegations in the said first count mentioned, which by this plea are not denied, or in any way controverted, and which are alleged against the said Andrew and John jointly, and not against the said John severally. The issue was tried at the last assizes for the Home District, and contingent damages assessed on the demurrer. Verdict, John guilty, and £20 damages. Andrew not guilty.

After argument last term by *Washburn* against the pleas



and in support of the demurrer, and *Ridout* and *Sullivan* contra; *Curia adv. vult.*

And this day judgment was given.

ROBINSON, C. J.—With respect to the first clause of demurrer to the second and third pleas of the defendant Andrew, it is decidedly not sustainable. The plea is in one respect informal; it sets out by referring to the assault, &c., “as in the first count mentioned,” which is a joint assault by John and Andrew; then having stated what he, Andrew, did, and justifying it, he concludes “which are the assaulting, beating, and illtreating the said plaintiff in the said first count mentioned, and whereof the said plaintiff hath above thereof complained against him the said Andrew.” This incongruity is rather apparent than real, for the assault which he justifies is in fact only that of which the plaintiff complains against him, though in referring in the commencement to the trespass of which the plaintiff complains, he must be taken to refer to the complaint of a joint trespass. There is clearly nothing, however, in the cause of demurrer assigned. It is the common course for defendants, when there are several, to join in the general issue, after which each defendant may justify separately quoad the trespass charged against him, and in such special pleas it is the course to speak of the trespass as if charged against that defendant alone who is justifying separately. The second cause of the demurrer is equally untenable; it is that the second and third pleas only put in issue and attempt to justify part of the causes of action stated in the count. That would be no cause of demurrer; it would be a discontinuance, and plaintiff might for that sign judgment if the general issue had not been pleaded for the whole. If the defendant by his plea had professed to answer the whole, while in fact his justification covered only a part, the repugnance would be cause of demurrer, but this is not the fault complained of (*a*). If these pleas are bad they are not so for either of the causes assigned, and the court could only regard such other objections as would lie on the general demurrer. This defendant, Andrew, has had a verdict in his favour, and therefore the decision of the demurrer only affects the costs. I conceive this plea to be bad on this ground, that it professes to justify the beating as set out in the count, but that what he pleads in justification will not justify; molliter manus imposuit in my opinion does not justify such a beating as is declared on here (*b*).

As to the cause of demurrer to the special plea put in by the other defendant John, that part of it which respects the

(*a*) 2 Saund. 28, No. 3; Gill. Hist. Com. Pl. 157-8.

(*b*) 8 T. R. 299; Com. Dig. Pleader 3, M. 16.



supposed objection of the plea answering a supposed separate charge of trespass against John alone has been already considered. As to the objection involved in the cause assigned, that only a portion of the injury set forth in the court is answered, that has also been considered in reference to the other special pleas. If the defendant has in his plea professed to answer all, and has omitted something of the gist of the action, that would be a fault and demurrable, but the plaintiff admits that the defendant only attempts to justify and put in issue a part; the bare leaving a material part unanswered is not cause of demurrer, it is a discontinuance. If this plea put in by John be bad on any other ground that the court can notice as on general demurrer, I should desire to see the defect exposed, for certainly the plaintiff proved on the trial a good cause of action against him, and he received from the jury a very moderate recompense for a grievous injury. I should be sorry that he were defeated in the recovery of this recompense by any error in pleading. The plea is son assault demesne, and the question that occurs is, whether it answers so specific and heavy an injury as the biting off a finger. I thought at one time that it did not, but on searching further I see the distinction is, that although upon a trial it is not every assault that will justify every battery, and the jury are to judge whether the plaintiff's assault was such as to justify the beating or maim which he received, yet so far as regards the pleadings it is well settled, that son assault demesne is an answer to an aggravation like the present, unless the plaintiff replies specially the excess, pointing it out and shewing that it is of that principally he complains. This would throw upon the defendant the necessity of a more particular justification, but in the present case, the plaintiff has not new assigned the trespass he complains of (*a*).

I do not therefore see that any fatal objection lies against this plea on this ground, and I am of opinion that judgment must be given for the plaintiff on the demurrers to the second and third special pleas, and for the defendant on the demurrer to the fourth special plea.

SHERWOOD, J.—The Chief Justice has gone so fully into this case, that it is perhaps unnecessary to make any addition to his remarks. The second and third pleas I think are bad, because the plea of *molliter manus imposuit* is no justification of a violent beating, or of a wounding (*b*). The fourth plea, in my opinion, is a good answer to the whole declaration, so far as relates to John Shore, because the plea of son assault demesne covers the whole of the trespasses of which the

(*a*) Saik, 641; 3 T. R. 297; Sid. 246; Keble, 884, 921.

(*b*) Say. 138.8 T. K., 199.

plaintiff complains (*a*). Judgment must therefore be entered for the defendant on the last plea, and for the plaintiff on the second and third pleas.

MACAULAY, J.—I find nothing to convince me that two defendants, in a case like this, may not unite in the general issue, and sever on subsequent special pleas of justification; though it is clear that if several defendants join in a plea they cannot afterwards separate in the rejoinder or other later stage of the pleadings under such joint plea (*b*).

The defendant must answer all he professes in the introductory part of his plea to answer, and no more. The second and third pleas profess I think to answer the whole first count of the declaration, but do not do so. Had defendant in the introduction narrowed the justification to a mere assault and battery to prevent the combating mentioned, the plaintiff must have new assigned, as the replication of *de injuria* would be held to extend to a denial of the plea only, and an admission that the action was brought only for the assault and battery justified. An excess should be new assigned. An interposition to separate combatants would not justify the aggravated assault alleged. The ground of demurrer is, that the plea if true does not excuse the excess in battery, &c., however it might have excused a less serious injury (*c*). The fourth plea *son assault demesne* may justify a beating, wounding, and mayhem, and the plea may be construed to answer all the trespass including the biting, &c., and plaintiff should have replied any excess or proved it at the trial if sufficient. *Prima facie* the plea is a sufficient answer. The plaintiff does not new assign, and say the assault and battery answered is not that for which he prosecutes, but denies that the justification is even *prima facie* sufficient. He admits by demurring that it covers the injuries complained of, but insists that it is no sufficient answer or justification of those injuries. The gist of the action is met; for any excess there should have been a new assignment, unless the first assault was trifling, and the acts of resentment so violent and outrageous, as not to sustain the defence of *son assault demesne* on the trial.

*Per Cur.*—Judgment for plaintiff on second and third pleas, and for defendant on fourth plea.

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(*a*) Cro. Eliz. 268; 1 Saund. 296 n. l., and the numerous authorities there cited.

(*b*) 2 H. B., 393, 4. (*c*) 8 T. R. 297; 3 Chit. Pl., 1069.

## BALLARD V. RANSOM AND JACKSON.

Where in trespass for taking staves, the plaintiff recovered 20*l*, where the law on some of the facts which were improperly elicited at the trial was doubtful, but it appeared that the plaintiff was entitled to recover something in that form of action, and the residue in another form: a new trial was refused, although a tender could have been pleaded to the amount of the whole claim, if the action had been brought in another form.

*Quære*.—Whether staves proved to have been culled, are to be understood to be piled and counted; and where agreement to deliver merchantable staves at the highest price and money paid on account, they vest in the buyer before culling, or as they are culled; or whether after culling the sellers dissenting either from dissatisfaction at the culling, or the price, could prevent their in vesting the buyer.

Trespass for seizing and carrying away a quantity of staves. Plea, the general issue. At the trial at the last assizes for the Home District before the Chief Justice, the following facts appeared in evidence. Some time in the early part of 1830, plaintiff had a number of staves on hand, and was then making more, and expected in conjunction with some of his relations to have from eight to ten thousand to dispose of; part of these were drawn to the banks of the Credit and lay there ready to be culled. The defendant Ransom was a lumber merchant and in the habit of buying staves, and it was agreed between him and the plaintiff that Ransom should have all the merchantable staves plaintiff should have to dispose of, for which Ransom was to pay the highest price given in that part of the country. This bargain was negotiated by a third person, who said to Ransom, that if it would be any object to him plaintiff would wait for his money till June. It did not appear clearly whether plaintiff assented to this extension of credit. Ransom then paid the plaintiff 7*l*. 10*s*. by way of earnest: the highest price generally given was 12*l*. 10*s*. per thousand, but a few small lots were sold at the rate of 13*l*. 15*s*. The usual course of trade appeared to be for the vendee to appoint the culler. When Ransom wanted the staves he went with a culler named Peter, and commenced culling with plaintiff's assent. Plaintiff after some time objected to Peter's culling as being too strict, alleging that he rejected merchantable staves. Peter, however, completed culling the parcel he began, in number about 1100, and they were marked with Ransom's mark, and subsequently taken away with plaintiff's assent. The defendant Jackson was also employed as a culler by Ransom. He begun to cull another parcel of staves with plaintiff's knowledge and consent; after culling a considerable number, the plaintiff became dissatisfied with him because he rejected merchantable staves, and was too strict. At last the plaintiff said Jackson should cull no more, and that he would not suffer those already culled to be removed, until



he and Ransom came to an understanding about it. Jackson and a clerk of Ransom's by his direction took away all the staves which had been culled, together with some which it appeared had not been culled. On this latter point, however, there was conflicting testimony; one of the plaintiff's witnesses assisted him in dressing over some of the staves rejected by Jackson, which were placed on the piles culled by Jackson. After the removal of the staves, Ransom tendered plaintiff £18 as the balance due for all the staves taken by him, which plaintiff refused to accept. The staves culled by Peter were taken away by Ransom, before the dispute about Jackson's culling arose, and the plaintiff did not, on the trial of this cause, claim damages for them, although they formed a part of the staves originally bargained by plaintiff to be sold to Ransom.

The jury, under the charge from the Chief Justice that he did not think the facts amounted to an absolute transfer of the property from the plaintiff to Ransom, found for plaintiff £20. In Easter Term last, the Attorney-General obtained a rule nisi for a new trial, on the ground that the charge was contrary to law.

*Draper* shewed cause.

ROBINSON, C. J.—It is often difficult to determine when a contract for the sale of goods shall be considered to be so far executed as to vest the property in the buyer, so that the goods shall remain at his risk, and be entirely within his control to remove, or take possession of them, without further reference to the vendor. The cases, however, though in some points contradictory, and turning sometimes upon subtle distinctions, have established certain principles by the help of which this transaction may be placed upon its right footing, though it is one of a class in some respects peculiar, being founded on a description of trade common enough here but not common in England. The principal question agitated at the trial and in the argument last term is, whether the culling of the staves under the circumstances stated in the evidence constituted a delivery, so as to make the sale absolute, and to vest the property in the vendee. I was not confident in the opinion I formed at nisi prius upon this point, but the opinion which I entertained and expressed was against the defendant, and I have no doubt that my opinion was acted upon by the jury and governed the verdict. If it was erroneous therefore, it would not be proper that the verdict should stand, unless indeed it should appear to us now upon undisputed facts, that there were other obstacles to the property vesting in the defendant besides the insufficiency of the act of culling, as described by the witnesses, to constitute



a delivery ; or that upon the whole evidence the ends of justice have been substantially obtained by the finding of the last jury. This dealing in staves is an important branch of trade in this province, and it is very likely to give rise to many questions upon the respective rights of vendor and vendee. It is therefore desirable that as opportunities arise, we should endeavour to clear up difficulties, by applying the general principles of law in respect to sale, to this particular species of traffic. When parties are enabled to see clearly their respective rights, the occasions of litigation and the causes of dispute, and even of violence, which the trade sometimes gives rise to, will be very much diminished.

I have doubted a good deal since the trial, whether the view which I took of the main question in this case was correct, but upon a comparison and consideration of the numerous authorities, and after reflecting upon the reason of the thing more maturely, I cannot find myself warranted in considering that the absolute property in these staves ever vested in the buyer ; to conclude that it did, would be, I think, to guard the rights of the vendor much less satisfactorily than the law seems inclined to do in the many cases arising out of sales. In the first place, no definite price was fixed for the staves ; and in the second place, it is not pretended that the price was paid or tendered, but this would be immaterial if it appeared that a certain credit was given ; upon the first objection, it is to be remembered that the defendant agreed to pay the highest price going, and it may be urged that that is sufficiently definite. I very much doubt it ; it is stated in Com. Dig. Agreement, A. 4, following the doctrine of the civil law, that if a man agree to sell goods for so much " as A. shall name, though the contract is not " complete till A. names the price, yet if the vendor sell the " goods to another before A. names the price, and A. afterwards names it, an action upon the case lies for the non- " delivery of the goods." Then A. had but to name the price and it became certain ; and therefore, under the maxim *id certum est quod certum reddi potest*, certain means were provided of arriving at a definite price ; it seems to me that we cannot say so here, " the highest price going ; is infinitely less precise ; does it mean as high a price as it could be shown that any one person had given in a single case for any quantity small or great, without reference to quality beyond their being merchantable, without being controlled by the time or mode of payment, or any thing peculiar that might have obtained, and which would make that single transaction no fair guide as to general price ; or does it not rather mean the highest price generally going, such as is instanced by a

and not merely supported by a solitary case. Again, at what point of time is the highest price going to be inquired of; it might rise or fall after the bargain; would the seller be entitled to the highest price at the time of the contract for the sale, or at the time the staves were culled, or when the vendee chose to take them; or would he be entitled to the highest price during that season. The price seems to have continued a subject of doubt and to remain so still. Ransom offered fifty dollars. The plaintiff at the trial gave evidence of a sale at fifty-five, but it is not stated at what period of the season, and undoubtedly if he could have heard of another sale at sixty, he would have been allowed to give evidence of that, which shows indeed that it never could be quite certain what the price was. Then before Ransom could have a right to remove these goods, he must, according to another principle in the law, have paid or tendered the price, or he must have obtained a certain credit for the price, in which case the right of detaining for a lien is waived. No day here was fixed for the payment, but Justin, who spoke on behalf of the plaintiff, and in his presence, said to Ransom, if you will take these staves and give the highest price going, Ballard, (the plaintiff) will have no objection to wait till June for his money, if it will be more convenient to you. Whether this conversation was during the ineffectual attempt at a bargain, or after the parties agreed, does not distinctly appear, but in fact no particular day was set (though it may be fair to consider that in effect it would postpone payment till 1st June), no evidence is given of any express acceptance of a credit on the part of Ransom, or of any stipulation ensuing upon the offer thus gratuitously made by Justin. But one witness swears that before the culling, which was relied on as a delivery, Ransom declared he would not give fifty dollars a thousand. I have met with no authority which would compel a vendor to relinquish possession of the article that he had sold (admitting that he had made no absolute delivery of it), while it was unsettled what price he was to get for it, while the price was unpaid and not tendered, and while it had not been finally agreed that a certain price, or a price which could be ascertained with certainty, was to be paid on any future day. Under circumstances such as these, I consider the contract executory, not executed, and that the vendor cannot be compelled to let his property go out of his hands upon an agreement of this description. Upon a difficulty arising or an apprehension of a difficulty, it must still be in his power to withhold the delivery, and to leave the vendee to his remedy. I come clearly to that conclusion from the examination I have made of this subject. The case in

question however, we must bear in mind, is not the case of the vendee bringing his action of trover or detinue against the vendor, and contending that he has made so absolute and conclusive a purchase that the property in the goods is vested in him, and that the former owner has no right to withhold them. If it were such a case, then the objections I have stated would be more directly applicable, and I think at present the plaintiff in such an action would fail, upon the ground that there was not such an absolute and conclusive sale as could vest the property. The person claiming to be vendee here, does not stand exactly on this ground ; he has possessed himself of the goods which were the plaintiff's, and he vindicates his possession on the ground that there was a sale so conclusive and binding as to change the property, and therefore that he only took what is his; and it is clear that when he took them, he had not paid any specific stipulated price for them, nor tendered any, and as the price he was to pay was not I think definitely settled ; as the credit assumed to be given was not proved to my satisfaction, either as to the time, or as to its being any part of the positive contract ; and as at all events the sum which the vendee must pay at any future period was and must continue to be uncertain, I should not think the purchaser was in a situation that would entitle him to take possession of the goods, even if the articles had been all in esse at the time of the contract, were specific in their nature, and requiring nothing to be done to them before delivery. But allowing them to have been all in esse at the time of the contract, it is clear that there was no sale of any certain specific goods ready to be delivered at the moment ; on the contrary it was a sale of all the goods that were merchantable, belonging to the plaintiff, and lying at a certain place on the River Credit. This introduces a new feature into the case ; the *merchantable* staves only were sold, the others not; there was no delivery of the whole staves at any time, nor was it intended. There was no delivery of the merchantable staves at the time of the bargain, and there could not be, for they were not ascertained and selected ; but the defendant says they were afterwards separated in a manner binding upon both parties, and so separated that the very act of separation constituted a sufficient delivery, and supplied all that was wanting to vest the property in him. Unless this can be made out, I take it to be impossible that the defendant can legally maintain his right as vendee of the staves in question. If it could be made out, then I think all the difficulty of the defendant's case would be got over, because then not only would the separation necessary to ascertain the property be established, but the actual delivery



of it, which defendant contends by necessary implication followed the separation, would disable the plaintiff from raising any objection as to price or payment. The act of separating the merchantable from the unmerchantable staves is called culling. The witnesses who were examined as to the course of trade agree, that the culler is usually appointed by the vendee. Evidence of this kind as to the course of a particular description of trade or dealing, is properly receivable for the information of the court or jury ; it is necessary among other reasons for the purpose of enabling us to place a proper construction upon the intention of parties in doing certain acts connected with the trade, but when we come to apply it, it is certain we are not to allow it to control general maxims and principles of law bearing equally upon all modes of trade and dealing ; it can be allowed only to have weight for certain purposes, and to a certain extent ; it cannot contravene the general and well established law of the land in a point bearing upon the very justice of the case. I might illustrate this by reference to many cases upon bills of exchange, where the court having received the evidence of merchants as to the usage of trade, have nevertheless not allowed such usage to prevail against the law. The distinction I am stating is fully explained in several of the treatises upon evidence ; no difficulty indeed arises here upon this point, because in truth, all that is definitely laid down by the witnesses as to the act of culling and the consequences is, that the culler is provided by the buyer ; they do not say by whom he is paid ; they do not say whether it is usual to regard him as acting for both parties ; whether his appointment is conceived to be countermandable by either party, for good cause or at pleasure ; they do not agree in stating whether a culler so appointed can go on in the absence of the vendor, or notwithstanding his disapprobation if present, nor whether as he goes through the lot, the separating the staves he calls merchantable must, against the will of the vendor, be taken to be by that act of culling, perfectly delivered to the vendee, so that they become thenceforth absolutely his property. On the contrary one witness says, he has always seen that when the buyer's culler has culled the staves they are his ; but then he qualifies this by adding, that if the seller were dissatisfied before they were marked, he could withhold them as he thinks. Another witness says, staves after being culled are frequently left unmarked, but after they are culled they are considered the property of the purchaser. A third witness says, he has always considered that when the purchaser's culler is culling, the seller being present and no dispute arising, they would be the purchaser's. This testimony, what-



ever it may be worth, is very far from showing that according to the understanding of those in the trade, the culling here was such as to be binding upon the plaintiff in respect to all the staves taken, and such as should have the effect of an absolute voluntary delivery; it preponderates the other way. But if the witnesses had taken another view of the case, I should not have been able to concur with them. It would, I think, be against law and reason, to call what was done here a delivery of the staves by the vendor, and I think we should have been bound upon principle to overrule such notions of law as incorrect.

In the case in 14 Ea. 308, which arose upon a sale of timber, the court considered the marking of timber by the vendee's agent, in the vendor's presence, and with his assent, as a delivery of the property; that was not done here, nor do I think it necessary; but to make the mere act of selection binding, and a *binding delivery* by the vendor, it must be a selection acquiesced in by himself, or made by some person who had the right to make it without consulting him; neither was the case here, in my opinion. I cannot say that there is a usage in the stave trade in this country, sufficiently authoritative and clear, to prevail against principles of law and natural justice. I cannot say that a vendee of staves has a legal right to appoint a culler, and that the other must accept him, and so far abide by his acts, that he must let the staves go which he selects as good, and be content with his right of action against the vendee, for not accepting others equally good, which the culler may have capriciously rejected. The law I think would decide, that the parties must either make the separation themselves, or if they cannot, must agree upon a culler, to do it for them. The vendee I think can but have an equal voice in the separation, if he has any; and until it can be made to the satisfaction of both, they are left to their recovery under their contract, which is wholly executory, and must remain so, until there is something specific delivered over by the vendor. It is clear, that at the time of the bargain nothing was absolutely sold; every thing was in contract. The plaintiff might have made 3,000 staves, out of trees that at that time were growing, and might have turned them in upon this contract, according to the terms of it. The plaintiff stipulated to let Ransom have all the merchantable staves he made that spring; while he had them lying in a heap on the bank of the river, merchantable and unmerchantable mixed together: whose were they? clearly they were the plaintiff's: and why? because he had delivered none of them to the defendant (*a*). Suppose he had

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(a) 6 Ea. 625

said plainly, I will not deliver any of them to you, what remedy had the defendant? could he have sent a culler, and taken all that he selected as merchantable? he certainly could not; he could but say, you engaged to let me have your merchantable staves, and now you will not deliver them, I will prosecute you upon your agreement. It must not be forgotten, however, than when Ransom named Jackson as a culler, plaintiff assented. What effect should that have? I can not say upon any principle, that the nomination was so wholly irrevocable, that whatever incapacity or whatever corruption the culler might exhibit, the plaintiff must adopt and abide by his act, so far as to allow his property to pass out of his hands, and look only to an action, on his agreement for a remedy. I think such a course would be unreasonable and unprecedented, and would most probably lead to acts of violence. The delivery should be a voluntary act of the vendor's, and if he fails in performing it, there is a specific remedy for the failure. To allow his property to be selected, counted, and removed, in his absence, without his knowledge, and against his will, by a person who without that very act has acquired no absolute property in it, would not be consistent with the interest of individuals, and the peace of society; and moreover if the simple act of culling, by the vendee's culler, and against the consent of the vendor, is to constitute a delivery, what would become of the right of lien and stoppage in transitu, which would be intercepted by the delivery.

There is a class of cases, in which, after a destruction of the property has occurred, the vendee seeking to throw the loss on the vendor, has contended that the sale was incomplete and the property not changed, because something remained to be done by the vendor which he has omitted, and which was necessary to be done before the delivery could take place. There is every reason in such cases why the loss should rest with the vendor, but it is not reasoning accurately to argue conversely from thence, whenever it suits the interests of the vendee to claim the property as his, that in all cases in which nothing remains to be done by the vendor to prepare the goods for delivery, the property therefore absolutely vests by the sale. It stills remains to be enquired whether all has been done that is necessary to constitute a perfect sale and transmutation of property; here at the time of the bargain there was no delivery, and could be none under the circumstances; a selection of good staves was to be made from the mass, and those only were sold; a process therefore was necessary to show what staves were sold; and even then, it is to be remembered that in this case the price to be given for them was not definitely settled; at any rate until the

process of selection was completed, the whole mass of staves continued to be the vendor's. All that is peculiar in this case, is the intervention of a culler, and we are to enquire into the footing on which he is to be considered as acting. We have no licenced cullers in this province as they have in Lower Canada ; our laws recognize no office of that kind : the mode of ascertaining what staves are merchantable, must therefore be purely conventional ; surely the vendee could not go to the heap, and take away just such as he pleased without the assent of the vendor ; he was bound (so far as it could be reduced to a certainty,) to take all that were merchantable, or I think he had no right to take any. This I take to be proved by analogy from several cases, and I have no idea that the selection could rest with him. The vendor, who still possessed the property, might with more reason, (if either could act without the concurrence of the other,) separate the good from the bad amongst his own staves, and then call upon the vendee to accept the delivery. If he should concur in the vendor's judgment, as to the selection, and should take the delivery, of course the sale would become complete. If he refused to concur, the vendor might say, I have given you none that are not merchantable, you must keep your agreement and take them all, or you shall have none. An action on the agreement would probably follow this dispute, and the evidence would show, who had right and reason on his side ; but the vendee I conceive could have that remedy only, and he could not cut the matter short by taking the staves according to his own selection, and by delivering them to himself. Then, if he could not do it in person, on what principle could he do it through the intervention of a third person, against the will of the vendor ; he cannot call any one he pleases to act as a culler, and place the vendor at his mercy, and if the parties should not concur in reposing confidence in any third person, and if the vendor will neither do that nor make a first selection himself, and tender the staves selected, it only follows that he does not perfect a transaction which he stipulated to perfect ; he leaves a sale incomplete which he engaged to make ; the earnest binds the bargain, and he must be sued upon his contract generally ; however it will happen as it happened here, that following what it seems is the usual practice in such cases, the buyer brings his culler when he is told the staves are ready, the seller either acquiesces in allowing him to cull or he declines ; if he declines he cannot, upon any principle I can find, say that this servant of the buyer has a right to proceed and cull the seller's staves, and by that culling effect a conclusive delivery of whatever he



chooses to select, so that the buyer may, without further ceremony, remove them as his own. If the law were so, then there would be no security against gross frauds and irregularities in this important branch of trade. But if, instead of declining, the seller agrees (as he is stated to have done in this case) that the buyer's cullers shall cull, in what situation does the culler then stand between the parties? he cannot be the agent of one only. If he is to be looked upon as the referee of both, then undoubtedly either party could revoke this submission to his judgment, before he was completely *functus officio*. I consider him, however, as merely the agent or *servant* of both parties, selected from a confidence that both have in his skill and integrity, and like any other person hired by two parties to do an act, in which they have both an interest, he cannot be continued in his employment at the pleasure of one, and against the will of the other, retaining authority to do acts which shall be prejudicial to that other, who rejects his services. If the vendor acts capriciously, or vexatiously, in interrupting the culling, so that the business is not completed in a reasonable time, or not at all, he acts dishonestly and breaks his contract; but that is not tantamount to a delivery of the articles in dispute. He might at any time, in breach of his agreement, have sold the staves, before the buyer came to cull them, because the property had not passed before, and this being so, he is committing no greater breach of his agreement, in throwing obstacles in the way of culling after it has been begun. It seems to me, that to determine otherwise, would be depriving persons dealing in staves of a necessary protection against fraudulent practices, and would be leaving a door open to altercation and irregularity, that would be avoided, by leaving parties in this case, as in others, the exclusive direction over their own property, until they have legally divested themselves of it by a perfect sale.

To make a sale perfect, something specific must be sold, and for a certain price. This latter requisition is very clearly stated in the old authorities, and though there may be few or no modern cases which turn upon this principle alone, it is nevertheless clearly enough recognized by modern authorities. In the civil law it is expressly laid down that there must be *certum pretium*: "*necessario secundum est quando perfecta sit emptio; tunc enim sciemus cujus periculum sit, nam perfecta emptione periculum ad emptorem respiciet; et si id quod venient appareat quid quale quantum sit et pretium; et jure venit perfecta est emptio.*" (a)

So Bracton, following almost the words of the civil law,

(a) Dig. lib. 18, Tit. 6. See also Institutionum, Lib. 3, Tit. 23.



lays it down in his chapter *De acquirendo rerum dominio ex causa emptionis* (a): "*Et quo casu oportet quod certa sit res quæ venditur et quod certum constituator prætium, nulla enim emptio esse protest sine certo pretio.*"

In the case in 2 T. R. 74, Mr. Justice Buller, alluding to the decision of Lord Mansfield in a case not reported of *Savignae v. Cuff*, conceives it to have proceeded principally on the ground that "no price was fixed for the goods sold," and I take it to be quite certain that a mere contract of sale, in which the price is not certain, nor the specified article ascertained, cannot have the effect of changing the property. A subsequent delivery of the goods, if that were proved, would of course render the sale perfect. At the trial I told the jury, I thought the culling the staves, under the circumstances stated, could not constitute a delivery of the whole; of that there can be no doubt; it could not be relied on as a delivery of any staves that were not culled, or of such as the culler rejected on his inspection; yet some such, it was sworn, were taken away by the defendants. The view I took at the trial of the effect of the circumstances detailed, was even more unfavourable to the defendants; I doubted whether any of the staves which the plaintiff in Ransom's presence forbade Jackson marking or removing (in consequence of his dissatisfaction at his culling) passed by the mere act of culling. I have been inclined since to consider that I was mistaken in this impression, but on the fullest examination that I could give to the question, I have returned to my first opinion. Considering the state of things at the contract, a voluntary unequivocal delivery was wanting to complete the sale; so long as the vendor chose to resist delivering them they continued, I think, in his power, and his determination to withhold the delivery was manifest enough. Ransom perfectly understood it so, and it is sworn by two witnesses that he afterwards (that is between the dispute about the culling in March, and the removal in May,) spoke of the staves as if it rested with the plaintiff to do as he pleased with them, and considering the evidence, and considering also that on the case as made out at the trial, some staves were sworn to be taken that the defendants had no right to take, and that for those, if the jury believed the evidence, a verdict must have passed against them, I see no good reason for disturbing this verdict, and if nearly the same sum can be recovered in another form of action, it would be contrary to the course of things to grant a new trial.

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(a) Lib. 2, Fol. 61.

SHERWOOD, J., dissented.—It has been contended that the contract made between the parties was in its nature entire, and embraces all the merchantable staves which the plaintiff had when the dispute arose, and that the plaintiff had a right to insist that the defendant should take all his staves or none. If the plaintiff ever had this right, I think he waived it by not objecting to Ransom's taking away the 1100 staves culled by Peter, before the remainder were culled by Jackson. Those staves were taken away after they had been culled, and the evidence does not go to establish that either party considered any further act necessary; they both seemed satisfied that the 1100 staves so culled belonged to Ransom. In my opinion, however, the plaintiff had no right to prevent Ransom taking away any part of the staves which were culled, counted, and as I think delivered, before the plaintiff formally declared his intention of not fulfilling the contract of sale (*a*). I understand that the lumber was taken away by Ransom about the first of May, and as the plaintiff had agreed to sell the staves on a credit for a large part of the price till the month of June following, nothing remained to be done by the parties except the culling and counting the staves, and the act of culling and counting under the circumstances of the case constitutes, in my opinion, conclusive evidence of the delivery. The contract of sale was, that Ransom should have all the merchantable staves; was not the act of culling and counting expressly for the purpose of ascertaining how many merchantable staves there were? and why did the parties wish to ascertain the number of merchantable staves, if Ransom was not to have them? It seems to me incorrect to suppose the culling and counting were intended for any other purpose. It might be urged that there is no positive proof that Jackson counted the staves which he culled. I think it was the duty of the culler, to determine how many of the plaintiff's staves were merchantable, and this could not be done without counting them. Hammond, a witness called by Ransom, stated that Jackson culled 935 staves before his dismissal, which were marked with Ransom's mark afterwards, and he further stated he thought the staves so culled were piled and counted, and although he did not particularly name the person who counted them, I think it but reasonable to presume it was the act of the culler, whose duty it was to count them. This witness further stated, that he supposed the staves were piled and counted regularly, which expression I think, was meant to convey the idea that the staves culled by Jackson before his

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(a) 6 Ea. 614; 9 B. & C. 386.

dismissal, were piled and counted in the manner ordinarily practised by cullers, and more particularly as the plaintiff raised no objection before or at the trial, on the ground that the staves were not counted, or the price was not sufficiently certain. There is another circumstance which I think merits consideration: the plaintiff made the culler a defendant in this action, which step has certainly had the effect of depriving the other defendant of his testimony, and there is nothing in the case to show that any better evidence of the culling and counting of the staves could have been obtained under such circumstances, than was given at the trial.

It might be further urged in this case, that even admitting the 935 staves were culled and counted before the culler was turned away, still as no specific price per thousand had been agreed upon by the parties, no property vested in Ransom. I have already said I thought there was sufficient evidence of a delivery of the staves to Ransom, and assuming that to be the case, then I think the staves culled and counted by Jackson, before he was dismissed by the plaintiff, became by the delivery the property of Ransom. Sir W. Blackstone says<sup>(a)</sup>, "when the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whom he pleases at any time and in any manner." The plaintiff in this case thought proper to agree to accept for his staves the highest price given to other people for their staves. It appears to me such an agreement, technically speaking, cannot be called uncertain. The legal maxim is "*Id certum est quod certum reddi potest*," and I cannot conceive there could be much difficulty in proving the highest price of one of the staple commodities of the country. I therefore think the contract of sale was good, and legally executed when the staves were delivered; Com. Dig. Agreement, A. 4; 3 Ea. 93; 2 N. R. 119; 5 M. & S. 189. The last three cases go to establish that delivering vests the property, where goods are sold on credit, without any agreement as to the price. To support the proposition "that when goods are sold on credit, the property vests in the vendee by delivery," I would also refer to 13 Ea. 522; 4 Camp. 237; 5 Taunt. 617; 3 B. & A. 680. I am of opinion that it was not necessary, to complete the sale in this case, for the parties to determine at that time what was in fact the highest price of staves, but that they were at liberty to defer that question till the day of payment should arrive. The evidence was sufficient to show that the vendee promised to give, and the vendor agreed to receive, a valuable and sufficient considera-

(a) 2 Com. 447.



tion or recompense for the staves, and that a part of the consideration was actually paid and the remainder was agreed to be paid at the highest price going.

It now remains to consider whether a new trial ought to be granted ; according to the case in 2 T. R. 4, and some others, if the court clearly see that substantial justice has been done between the parties, and that the plaintiff is unquestionably entitled to recover a verdict in some form of action, they will not grant a new trial even if they are fully convinced the law has been mistaken, and if I felt satisfied a verdict ought to be given for the plaintiff, in this or any other form of action, I would say the rule nisi should be discharged. I discover nothing, however, to lead to such a conclusion. Whether the plaintiff ought to recover any thing in the present suit, I think depends on the previous question, whether he took away any more staves than were culled and counted ; this point has not yet been satisfactorily determined, because the jury at the trial must have supposed from the charge of the learned judge, that Ransom was not entitled in law, to any part of the staves at the time he took them, or they could not have rendered a verdict to the extent of the value of all the staves as they have done ; whether the plaintiff has a right to recover a verdict in any other form of action, appears to me equally doubtful. The plaintiff received 7*l.* 10*s.* as earnest, and Ransom was ready and offered to pay him the further sum of 18*l.*, and I think it both reasonable and equitable to presume that the 18*l.* are still ready for him. If these two sums are sufficient according to the contract of sale between the parties, to satisfy the plaintiff the full price of all his staves, then in my opinion he is not entitled to recover a verdict at all in any form of action. If no more than 18*l.* are justly and honestly due to the plaintiff, and an action of assumpsit should be brought to recover it, the defendant might plead the tender of that sum and pay the money into court, and if the plaintiff could not show that any more was due at the time of such tender, he would lose his own costs, and be obliged to pay costs to the defendant. Upon the whole I am not fully convinced that justice has been done in this action, or that the plaintiff would recover a verdict in any other form of action, for any amount. I think there is evidence to go to a jury to show that the whole of the staves which Ransom took and carried away, had been culled and counted with the consent of the plaintiff, and I also think these acts amounted to a delivery. In Taunt. 459, Mr. Justice Heath said, "If goods were weighed out or measured, that would be a sufficient delivery." I think the property in all the staves delivered



vested in Ransom because he accepted them and wished to keep them under the contract. This is my view of the present case, and on these grounds and some others, I should have wished to grant a new trial without costs, but as the opinion of my learned brothers is different, the rule nisi must of course be discharged.

MACAULAY, J.—It seems a well established general principle of law, that where specific chattels in esse are sold and earnest paid, the general property of the things sold is by the bargain vested in the vendee, though the possession continue in the vendor (*a*). But if nothing be agreed as to the period of payment of the balance; if no credit beyond the time appointed for the delivery be given, the vendor has a lien upon the property till paid; the payment of the price and the delivery of the goods being concurrent acts, mutually dependent upon each other; so that if the vendee would have the goods he must pay or offer to pay for them; if the vendor would have the money he must deliver or offer to deliver the articles sold (*b*). If a credit be agreed upon, and the article sold be in a deliverable state, the property at once vests in the vendee absolutely by the contract (*c*). Yet, although the price is arranged so as to entitle the vendee to immediate possession, if any thing remain to be done by the vendor in order to identify the property, or ascertain the quantity, &c.; it remains in the possession of the vendor till all is done that it is incumbent upon him to do (*d*); and the property is at his risk (*e*). If the article is not in esse it must be made and delivered (*f*). In other cases, when all is done on the part of the vendor, and the property merely remains in his possession, subject to his right of lien for the price, it is generally at the risk of the vendee. The vendor may if disposed waive his lien, and absolutely deliver the property without being paid, relying upon the personal responsibility of the vendee (*g*). And when it becomes questionable or equivocal whether the vendor, under the circumstances in evidence, meant to deliver absolutely, and the vendee to accept the property, it forms a question of fact

(*a*) Hob. 41; 2 Bl. Com. 446-8; 1 Salk. 113; 6 Mod. 162; 12 Mod. 344; Bull. N. P. 51; 7 Ea. 588, 571.

(*b*) 1 H. Bl. 343; 2 H. Bl. 316; 5 T. R. 231, 189; 8 T. R. 332; 1 Ea. 203; 2 B. & P. 247; 6 Ea. 625; 2 B. & A. 755; 3 B. & A. 683; 3 Ea. 102; 1 Mars. 512; 7 T. R. 440; 5 B. & C. 638, 857; 1 N. R., 69; 2 H. Bl. 504.

(*c*) 4 B. & C. 941.

(*d*) 6 Ea. 614; 7 Ea. 570; 11 Ea. 210; 12 Ea. 614; 4 Taunt. 644; 5 Taunt. 176; 13 Ea. 522; 14 Ea. 309; 2 B. & C. 40; 3 B. & C. 1; 2 M. & S. 397; 3 B. & A. 683; 5 B. & A. 557, 858.

(*e*) 6 E. 614; 4 B. & C. 941; 6 B. & C. 389.

(*f*) 1 Taunt. 318; 8 B. & C. 277; 3 B. & C. 1.

(*g*) 7 Taunt. 278; 3 B. & A. 321.

proper to be left to the consideration of a jury to determine the intentions by which the parties were actuated (a). A selection of property by the vendee from a mixed quality, upon a previous contract and sale at a credit, earnest being paid, and an adoption of the act by the vendee, converts that which before was a mere agreement to sell into an actual sale, and the property in the goods passes to the vendee. The application of the foregoing and other general rules depends upon the nature and peculiar circumstances of the contract in question, and will frequently be found difficult. In the present case, if the staves were clearly sold upon credit, so that the defendant could claim them previous to payment, and had the price been fixed, then I should think the culling by a culler appointed by the defendant, and acting with the knowledge and consent of the plaintiff, would constitute an appropriation of the staves as fast as culled by the plaintiff with the knowledge and assent of the defendant, and that they would at once vest absolutely in the latter, the plaintiff having no lien or right to withhold them; subject, however, to the defendant's right to return any portion less than the whole, upon the plaintiff's refusing to allow the culling of the whole, and subject to the plaintiff's right of reserving any less portion than the whole, should the defendant refuse to accept the whole. But in this case it does not satisfactorily appear that the contract was for a sale upon credit, and if not, then the plaintiff having a right to withhold the staves till paid, it would be inconsistent with such right that the bare act of culling should be construed a delivery, and some substantive act of delivery should be super-added as indicative of his intention to waive such right, and to rely upon the personal responsibility of the defendant. If the fact of credit or no credit was doubtful, it would form proper subject of consideration for the jury, and the jury have not affirmed the former. Further, no price was agreed on, and the amount was referred to an uncertain test about which the parties might differ; and in the absence of an adjusted price, I should think, the preliminary step of culling, which might be merely to ascertain the quantity, would not in such case constitute also a delivery; I should think the plaintiff's right to withhold them after being culled, until the price was mutually agreed upon, would continue, unless waived by some unequivocal act of delivery evincing an intention to forego such right. There is no proof that the plaintiff stood upon the amount of price, but until it was fixed, something remained to be done as between the seller and buyer without which the property would not absolutely

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(a) 1 Ea. 192; 1 Moo. 328; 2 B. & C. 511.

vest, unless as already remarked the right was waived by a delivery ; such a delivery might be effected by the mere act of culling, or it might not, according to the intentions of the parties. The intention of the present parties is rendered equivocal by their several acts. The plaintiff forbids the removal of one portion already culled, and assents to the removal of another ; the defendant takes one part with the assent of the plaintiff, and the other quantity against his will, after ineffectual overtures to arrange matters subsequent to the plaintiff's refusal. It is questionable whether the defendant meant to stand upon the contract or not throughout. It is questionable whether the plaintiff meant to deliver all the staves culled as fast as culled, by the act of culling, without regard to lien or the adjustment of price ; it is even doubtful whether his assent to the defendant's taking those first culled was given in furtherance of the contract, or with a view to cover the defendant's advances after the contract was repudiated (though it could not be rescinded) by him. In addition to all which, it does not appear that the staves culled were counted when plaintiff refused to proceed, and if only the quality and not the quantity had been previously ascertained, something remained to be done between the vendor and the vendee, viz., counting to ascertain the number, without which the property would not vest, even under a credit sale at a specified price. Upon all these points, if doubtful in fact, the jury should decide ; they do not seem expressly to have been left to the jury, and the verdict does not determine any of them in favour of the defendant. The foregoing observations assume that the defendants took no more staves than those actually culled, but the weight of evidence and the finding of the jury imply, that he took a portion, if not all those that remained unculted when plaintiff forbade Jackson proceeding. Now, the latter staves clearly would not vest till culled, and being taken away without that necessary previous step on the express assent of the plaintiff, the action undoubtedly lies as to them, and so far the plaintiff is entitled to recover in this action. The extent of this right, apart from the culled staves, is uncertain ; but for the latter he would be equally entitled to recover in another suit if not in this. Under such circumstances, the verdict only extending to the value of all the staves taken by the defendant, and the facts as respects those culled by Jackson being rendered doubtful and unsatisfactory by the conduct of the parties in some respects, and by the bearing of the testimony of the witnesses in others, I am of opinion that for so small a subject-matter, the court exercises the



soundest discretion in refusing a new trial—the only object of which, in my view of the case at present, would be to investigate more minutely and distinctly the facts as they existed, in order to raise legal points that have undergone discussion; the result of which could not be satisfactorily determined without a more precise knowledge of the facts, and which after all, if in favour of the defendant (a very doubtful event), would only reduce, and not destroy, the verdict in the plaintiff's favour.

*Per Cur.*, SHERWOOD, J., dissenting.—Rule discharged.

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### DOUGLASS V. POWELL.

To debt on bond for £400, setting out condition and assigning breaches, the defendant cravedoyer and demurred, and the plaintiff had judgment, and entered judgment for the amount of the penalty and costs, and issued execution, without going to a jury; the defendant having moved to set aside the proceedings, the plaintiff had leave to amend by striking out the final and entering an interlocutory judgment, and entering an award of venire to assess those damages and enquire of further breaches, although three years had elapsed from entry of judgment.

Debt on bond for £400, conditioned to submit matters to arbitration, and abide by, obey and fulfil the award. The declaration, after shewing the bond and condition, set out an award directing the defendant to pay to the plaintiff £250 in four equal annual instalments, with interest. First breach, that the first instalment became due before the bringing of this suit, and was not yet paid. Second breach, that the defendant did not pay the further sum of £3 17s. 6d., being the amount of interest due on the first instalment. The defendant cravedoyer of the obligation, and set it out on the record with the condition, and then demurred; and the court afterwards gave judgment for the plaintiff on the demurrer. Judgment was then entered for the debt, £400, and the taxed costs, for which the plaintiff sued out a fi. fa., endorsed to levy £70 11s. 3d., being the amount of the instalment and interest expressed in the declaration, and costs. The defendant afterwards applied to set aside this fi. fa., on the ground that the plaintiff had no legal right to levy any sum till the damages were assessed by a jury, conformably to the statute 8 and 9 Will. III. chap. 11; and the court set aside the fi. fa. for want of that proceeding. And Draper in a former term obtained a rule nisi to strike out the entry of the final judgment and all the subsequent entries on the roll, and in lieu thereof to enter an interlocutory judgment, and further suggestion of breaches, and an award of venire facias to enquire of the truth of those breaches and assess damages thereon.

ROBINSON, C. J., said, that under the peculiar circumstances of this case, he was in favour of granting the appli-



cation, as the judgment of the court had been on a former occasion expressed as to the plaintiff's proceeding to sue out an execution for the sum mentioned in the breaches in the declaration. In any other case he should feel it necessary, however to investigate that question carefully before giving any opinion.

SHERWOOD, J.—Upon this motion I think it necessary to determine first, whether this court has authority to grant the indulgence solicited by the plaintiff; second, if they can legally do so, whether such a step would be proper. At common law, the court in term, or a judge at chambers, in ordinary cases have authority to amend the declaration plea, replication, &c., in form and in substance, while the pleadings are in paper and before they are entered of record (*a*). After the proceedings are recorded the court will amend no further than the statutes of amendment clearly warrant, and in order to amend on those statutes, the general rule is that there must be something to amend by (*b*). Now it appears to me, there is something to amend by in this case; the declaration sufficiently shows that the plaintiff proceeded so far under the statute of Will. III., and in my opinion he was bound to continue the subsequent proceedings precisely conformable to the enactments of the legislature. The damages which the plaintiff sustained have not been assessed by a jury, as the statute requires; in answer to this objection it is asserted there could be no necessity for assessing the damages, because they are set out in the declaration, and admitted by the demurrer. In my opinion, the admission on the record does not go that extent; I think the defendant admits the plaintiff has sustained some damages, but he does not admit the amount. The debt is admitted because it appears on the face of the record, and the damages are not admitted because they cannot appear there. They accrue in consequence of the breach of an agreement distinct from the obligation itself, and of a different species of contract. The damages which the plaintiff is allowed to recover under the statute of Will. III. are in my opinion in the nature of damages recovered in actions of covenant, trespass, case and assumpsit; and the forms of proceeding under the statute, which are found in the most approved treatises on the practice of the English courts, seem to warrant this position. Viewing the subject in this light, I think the plaintiff cannot collect such an amount as he may think the defendant has admitted to be due; but the true amount must be ascertained in another way. In cases where promissory notes or bills of exchange are declared upon, although the real amount due the plaintiff may

(*a*) 3 Salk. 31; 1 Wils. 7. 223. (*b*) 8 Co. 161; Strange 583, 846.

clearly appear on the face of the declaration, still that fact affords no valid reason for dispensing with the reference to the master or the assessment of a jury. In an action of assumpsit for a sum certain due on an agreement, the court, after judgment by default, will not allow a reference to the master, but will insist on the plaintiff going before a jury to assess damages (a).

Independently of the necessity of assessing damages in this case, which I think arises from the analogy in the nature of the damages to those actions just mentioned, it appears to me the statute itself decides the matter. It expressly allows the defendant the right of paying the amount assessed by a jury, together with the costs, to the plaintiff in satisfaction, and prohibits the plaintiff to enforce payment of anything more. If the plaintiff could dispense with the necessity of taking the opinion of a jury, it appears to me he would have the power of depriving the defendant of the safeguard created by the statute, because that is the mode prescribed by the statute, and there is no other mode allowed in a court of law. By the common law he would have been driven to a court of equity. I think the plaintiff should have entered an interlocutory judgment in the first instance; and, after assessing damages before a jury, I think he should have entered a final judgment. I see no difference in principle where the plaintiff assigns breaches in his declaration, and where he suggests them on the roll, if judgment by default, or on demurrer is signed against the defendant.

The action is brought on the specialty, for the debt, not for the damages, which may have accrued on the breaches assigned in the declaration, and no judgment is ever entered for them. The judgment is entered for the debt and costs under the common law. The damages are collateral to the subject-matter of the suit, and the defendant does not admit the amount of them, because such admission is not at all necessary to support the plaintiff's action. It is in his power to enter final judgment, without assigning any breaches of the agreement contained in the condition of the bond (b).

By the common law the plaintiff might sue out execution for the whole debt, but the stat. Will. III. abrogates that rigorous proceeding, and compels the plaintiff to submit his claim for damages to the equitable decision of a jury, and to collect no more from the defendant than in good conscience he is entitled to. I think it was not the intention of the legislature to allow a judgment by default or on demurrer to be conclusive on the defendant as to the amount of damages which the plaintiff in good conscience was entitled to; perhaps it was

(a) Tidd's Practice. 619.

(b) 3 B. &amp; P. 607.

owing to the ignorance or mistake of the defendant, that the plaintiff obtained such judgment at all. It is quite possible notwithstanding such judgment, that he has paid some part of what the plaintiff honestly ought to have, and that he may be able to convince a jury he has done so. In 8 T. R. 255, the court said, "This statute requires a liberal and "beneficial construction, it being made in advancement of "justice, and in ease of defendants."

As I think the plaintiff should have entered an interlocutory and not a final judgment in this case, I am of opinion he should be allowed to amend, by striking out the present judgment and entering the proper one. I think the following authorities will warrant the measure: 1 T. R., 783; 3 T. R., 349; 3 M. & S. 591.

MACAULAY, J.

*Per Cur.* Rule absolute.

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REX v. HON. WILLIAM ALLAN, HON. PETER MCGILL,  
AND S. P. JARVIS, ESQ.

Where in the original plan of a township a piece of ground was laid out as a highway, which was subsequently granted by the crown in fee to several individuals, and was occupied by them and others claiming from them for upwards of thirty years, and never had been used as a highway: Held, that an indictment for a nuisance for stopping up that piece of ground, claiming it as a highway, could not be sustained.

This was an indictment for a nuisance in obstructing a highway. The prosecution was commenced in the Quarter Sessions, and removed into this court by writ of certiorari. At the last assizes for the Home District a verdict of guilty was taken, subject to the opinion of this court upon the question whether the locus in quo was at the time of the alleged obstruction, to wit, 4th June, 1830, a public highway, as described in the indictment; and whether, if it were so, the occupation of the defendants (as proved at the trial) can in law exempt them from their liability to this prosecution.

The case was in substance as follows:—The township of York, as now laid out, comprises a tract of land of several miles square, lying behind the town of York and immediately adjacent to it. The town of York is seated between the township and the bay or harbour of York, and fills up the space between the township and the harbour. The township extends above and below the town for several miles, and the boundary of the township on that side which is adjacent to the town is called the front line of the township. Before the year 1793 neither the township nor the town plot were surveyed. On the 26th June in that year (which was at a very early period of the settlement of this province)



the government, through their proper officer (the Surveyor General), gave directions for the survey of the township of York ; that is, for the laying it out into lots. The deputy surveyor employed on the occasion received written instructions from the head of his department in these terms:—“ The front line of the first concession commences adjoining the township of Scarborough, at a point known and marked by Mr. Jones (the surveyor to whom these instructions were given), running south  $74^{\circ}$  west from said point, *one chain for a road*, then *five lots* of twenty chains each, then *one chain for a road*, then five lots more of twenty chains each, then one chain for a road, and so on till the said line strikes the River Toronto (now the Humber). The concessions are one hundred chains deep, and one chain between each concession to the extent of twelve miles. The work is to be done in the following order, viz.—To run and open the *front or base concession line*, and mark the lots *thereon*, and to picket the lots from thence to the water's edge.” What follows in the instructions has no bearing upon the point in question. The front or base line spoken of in these instructions is the boundary line of the township adjacent to the town plot.

The instructions, to leave one chain for a road at every five lots, relate to allowances for roads to be left along the side line of the lots, to lead from the base or front line, to the rear of the township, and to run at right angles with the front line. Nothing express is said about any road, or allowance for road, along the front of the township ; but the surveyor was instructed to run and open *the front or base concession line* ; to mark the lots *thereon*, that is to place upon the front line the posts designating the front angles of the lots in the front range, and to picket the lots *from thence* to the water's edge ; from *thence* means from the base or front concession *line*, and to picket the lots to the water's edge, means to protract the side lines of the lots in the first range until they touched the water's edge. No direction was given to leave a chain, or any space for a road, in front of the township line. The deputy surveyor, however, when he returned his survey, accompanied it with a diagram of the front concessions, and upon this plan is laid down a space of one chain in width, along the whole front line of the township, and between it and the present town plot, evidently intended to represent a road, and designated on the plan by the name of Lot Street. This plan is a copy of the original, which was deposited in the office of the Surveyor-General. On the 7th of November, 1796, instructions were in like manner given for the survey of the town of



York. No particular instructions as to this survey were given in evidence; but a copy of the official map compiled from this survey was produced, and it exhibits a space of *one chain* in width, lying between the town plot and the front line of the township, designated as Lot Street, extending along the whole rear boundary of the town, and being evidently part of the space designated as Lot Street, and extending in that map along the whole base line. The lots in the front concession of the township, laid out originally twenty chains in width, according to the instructions, were afterwards, it seems, subdivided by the government; and they were granted in lots ten chains in width, i.e., one hundred acres in each lot. Of these lots, Nos. 5, 6, 7, and 8 front in that part of the township-line which is immediately behind the town, and are therefore upon the north side of the space designated on the two plans as Lot Street. Mr. McGill, one of the defendants, is the proprietor and occupier of Nos. 7 & 8. Mr. Jarvis, another defendant, is the proprietor and occupier of No. 6, deriving title from his father, the original grantee. Mr. Allan, the other defendant, is the proprietor and occupier of No. 5, acquired by purchase from Mr. Smith, the original grantee of the Crown. In the town several streets were laid out running parallel with this space called Lot Street. The nearest parallel is called Hospital Street, between which and the space in question there was laid out a range of town lots of about an acre each. Hospital Street, and the other streets laid out in the town, have been opened, and now form public highways in constant use. The surveyor being instructed to run the base line of the township on a perfectly straight line, as is usual, executed his instructions strictly, paying no regard to the nature of the ground, as to its fitness or unfitness for a *road*. In point of fact, that part of the space called Lot Street, on the plan returned by him, which lies in front of these lots, 5, 6, 7, & 8, was, from the circumstance of a creek and ravine running along it, regarded as wholly unfit for a road, and being considered impracticable, was not cleared or opened. It was never used as a highway, but continued in its natural state as a wilderness from the time of the survey, until the 22nd of December, 1798, when it was resolved by the Governor and Council, by a formal act in council, "to amend the course of Lot Street, so as to avoid a large ravine and creek, with some other wet spots; and, by opening the same a chain wide, to connect it with the road that leads to Quebec." This minute of council proceeds thus: "there will then remain to be disposed of the irregular patches washed with the lake, upon the plan,

“being the stripe between the improved Lot Street and the  
 “100 acre lots, excepting the two lots of Mr. and Mrs. Mc-  
 “Gill, and a gore or small piece left between lots 2 and 3,  
 “at the east end of the town, which is not in the direction  
 “of any street, leads to no place, and is of no use. The  
 “former of these being granted to the possessors of the 100  
 “acre lots adjoining, and the latter small strips to the  
 “possessor of lots 2 and 3; these at fifty dollars per acre,  
 “which is a higher price by a great deal than the average  
 “of lands in similar situations, will produce nearly as fol-  
 “lows” (specifying the amount for each small tract) “in all  
 “350 dollars. This arrangement does not interfere with  
 “any of the locations made, nor does it interfere with the  
 “usual breadth of the road, except at the north-west angle  
 “of Frederick Busle’s lot, where to the top of the bank is not  
 “more than 45 feet, a space sufficiently wide for the road, as it  
 “is a mere pass of this width. The pound to be in the triangle  
 “adjoining the said Busle’s lot. A triangle washed black  
 “is left to cover the site of a few graves on the top of the  
 “bank on this side of the ravine. A grantee who receives  
 “an acre at the before mentioned rate of fifty dollars, who  
 “is obliged to open Lot Street the width of his 100 acres,  
 “and to pay for his title deeds, will be at the expense of  
 “seventy-seventy dollars or thereabouts.”

At the time of this minute being made, the Surveyor General, by direction of the Governor, submitted two sketches one of them shewing the projected improvement of Lot Street contemplated in this act of the Governor and Council, adopting Hospital Street as the highway in front of these lots, 5, 6, 7 and 8, and leading obliquely into Lot Street at either end of the space occupied by these lots. The other sketch related to a projected road in the vicinity, wholly unconnected with the place now in question, which it was thought desirable to open, and to which the government resolved to apply the funds to be obtained from the sale of the broken ground in front of lots 5, 6, 7 and 8, which they had condemned as unfit for a road. The plan submitted by the Surveyor-General was approved of, and on the 22nd December, 1798, Mr. President Russell and the Council expressly adopted the sketches laid before them, and ordered the alterations to be carried into effect; they determined at the same time to sell the space spoken of, for procuring the desired fund; they felt that it would be unjust to put these small tracts up to public auction, or to dispose of them in any other manner than to the proprietors of the adjacent one-hundred-acre lots; because, by the projected alteration, they would have interposed between the original front of those lots and the high-

way, and would, if they fell into the hands of other persons, have completely shut out the proprietors of the lots 5, 6, 7, & 8, from the road and from the town. They were therefore valued by the Council, and purchased at that valuation by the respective proprietors of the adjacent one-hundred-acre lots. Mr. McGill, one of the defendants, paid for the space opposite to his lots, 7 & 8, £22 10s. ; Mr. Jarvis, the ancestor of another of the defendants, for his tract, £18 ; and Mr. Smith, from whom Mr. Allan purchased, £19 10s. The government received for the whole space, £60, and granted the land by patents under the great seal to the respective parties ; in all of which patents it was noted that the land was *purchased* by the grantee. The patent to Mr. McGill, issued 31st December, 1798 ; that to Mr. Smith, in the same year ; and that to Mr. Jarvis, in 1817. All the maps of the government made since this alteration exhibit this space, which was formerly marked as part of Lot Street, as being now disposed of and granted. The present Surveyor-General was called as a witness, and stated that he is perfectly certain the space in question was never used as a road, or was in a condition to be used, before it was thus disposed of, and that since that period (December, 1798,) it has continued to be enclosed and occupied by the respective purchasers.

ROBINSON, C. J.—The thirty-two years that have elapsed since this disputed land was granted, have produced a great alteration of circumstances. The town of York, which was then only in prospect, has become large and populous. By the effect of long continued cultivation and exposure to the sun, the ground which was once so wet, broken and unsound, as to be thought impracticable for a highway, has become very much reclaimed, and the clearing of the adjacent country has diminished the waters of the creek, which seemed to present a formidable obstacle ; and if the natural difficulties were greater than they are, they could no doubt be overcome, by the means which the increasing population and opulence of the town supply at present for such purposes. The obstacles which very probably, in 1798, appeared to all to make a deviation necessary, may now seem to be very trifling, looking at this lot of land in the state to which long cultivation has brought it ; and although the going round a few yards to avoid a swamp and ravine may have seemed a very trifling inconvenience when there were but few individuals living in the vicinity, it may now appear, and it may in fact be, a considerable disadvantage to a more dense population. On the other hand, it is just to consider that the small tracts of land which the defendants, in the year 1798, acquired from the government by purchase, at a price then stated to be



above the actual value, may have now increased in value many hundred fold. Whatever may be their present state, whatever valuable buildings might happen to have been built upon them, if the defendants are guilty of a nuisance in occupying these tracts, then it would follow, as a necessary consequence that their occupation must be abandoned, and the public must be restored to their right.

Upon the facts of the case, it is in my opinion out of the question that the indictment against these defendants can be sustained. If it could, it is very evident that it could only be by the strictness of law prevailing over equity, as decidedly as in any case that can well be stated. That according to the general opinion, there has been no reason to regard the defendants as guilty of a nuisance, seems very clear from all that has taken place. If in keeping up an inclosure which they have maintained without interruption or question, and in continuing to cultivate the ground which they have cleared and occupied for more than thirty years, they were guilty of a nuisance, they must, upon every principle of law, have been more clearly and decidedly guilty in the year 1798, when they first put up their fences ; and if, during the whole period that has intervened, it had been considered that they were illegally infringing upon the rights of the public ; it was in the power of any single inhabitant to have instituted the well-known proceeding that has recently been commenced in order to try this question ; and if they had established the right, it is quite clear that the obstruction must have been removed, whatever may have been the injury to the defendants. The term that has elapsed cannot have placed the defendants on more unfavourable ground : whatever effect it can legally have, must clearly be in their favour. Though I have not considered the law of this case doubtful, since I heard the evidence, I have felt it to be a case which involves principles very important in the application here.

On the one hand, the law ought to be jealous, and is jealous, in guarding every right and convenience which the public can justly claim ; and few considerations are of more interest to the inhabitants of a country, than the enjoyment of commodious highways. On the other hand, most implicit confidence has always been placed, and ought to be placed, in the king's letters patent, when no imposition has been practised upon the government in obtaining them, and when all has been transacted openly and in good faith, as in this instance. It is important in this country that this just and necessary confidence should not be shaken ; for every title in the province rests upon the same foundation as the de-



feudants' titles to these pieces of land. The king's grant supports the whole; and it would appear difficult to reconcile it to one's sense of justice, that after the king by a solemn act of his government had disposed of a tract of land to one of his subjects for a valuable consideration, the proprietor should find himself, after an open and peaceable possession of more than thirty years, prosecuted in the name of the king as an offender, because he occupied the very land which the crown had granted to him. Still the facts might be, perhaps, such as to lead lawfully to such a consequence; and we must inquire whether they are such in this case. The plainest way of considering the question is, to ask in the first place what constitutes a highway at common law. It is said that anciently there were but four highways in England which were free and common to all the king's subjects. All others are supposed to have been made through the grounds of private persons, on a writ of *ad quod damnum*; or they have been established by long user, or by other circumstances which have led to their being regarded in law as having been dedicated to the public as highways by the owner of the fee.

*[To be continued.]*

# THE UPPER CANADA JURIST.

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UPPER CANADA QUEEN'S BENCH REPORTS.  
OLD SERIES.

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REX V. ALLAN ET AL.

*[Continued from our last.]*

The adjudged cases which have any bearing upon the point before us, are by no means numerous. Questions respecting the obligation to repair, and upon the character of particular obstructions complained of as nuisances, are the most common, and from them some principles are to be gathered which illustrate the subject generally. But the cases which at the first sight seem to be the most relevant to the subject of this indictment, are those which turn upon presumed dedications by private individuals. These are not very many in number, and they are not altogether consistent. Lord Kenyon, in one case, considered that an uninterrupted use by the public for eight years, with the assent of the owner of the fee, was sufficient to constitute a dedication of the ground as a highway, when there was nothing to rebut the presumption of such an intention; and he cited a case in which six years had been held sufficient (*a*). Sir James Mansfield questioned the soundness of this doctrine (*b*); and a perusal of the different authorities on this head will show that the opinions have not been very uniform, but it is useless to compare these authorities for the purpose of this case.

We are not left here to argue about dedication to be presumed from user for any time. There never has been any user; there is nothing to build a presumption upon, nor are we left to conjecture in any degree. *Stabit presumptio donec probetur in contrarium*. We know what

was done, and what was intended, and we are only to consider the legal consequences which have followed. The present owners of the fee never intended to dedicate this land to the public, that is clear, for they have always enclosed it and kept the public out. It is equally clear that the king, the former owner of the fee, whatever he may have intended in 1793 or 1796, did not intend in 1798 that it should be a public highway, for he disposed of the lands expressly because it was unfit for a highway ; so that the only question that remains is, whether what the king did in 1798 had disabled him from doing then what he did. It was not pressed as an argument, (for indeed it would have been a most unreasonable argument, and the case was treated with perfect candour on both sides) but it readily suggests itself, that as in England it may happen, and in fact usually does happen, that though the public enjoys the easement the freehold is still vested in the individual proprietor of the estate, through which the road runs ; so here we may admit that the king has properly granted the defendants the fee by his patents, without admitting it at all to be a necessary consequence that the public were meant to be excluded from the enjoyment of the right of way. We cannot fail, however, to see that this would not be that construction of the king's grant, which would be most for the honour of the crown and the advantage of the grantee, as in this case it ought to be. It is apparent no easement was reserved or meant to be. If any right of highway had remained, it must indeed have covered every inch of the soil granted, and the purchasers would have literally nothing for the money which the crown received for them, and with which they opened another highway for the public benefit, but the whole evidence negatives any such idea, and the only question after all is, whether the crown, under the circumstances, could legally dispose of the land as it is plain it was disposed of. I can find no principle or authority on which I could deny the right. Would all that is done here have constituted a dedication binding upon the private owner of an estate ? I think it would not ; there was no user by the public, it had never been opened or cleared, and of course never repaired by the public. Placing the strongest con-

struction upon the facts that occurred, there may be said to have been an intention indicated to appropriate this space for a highway, though in truth there is little more to show such an intention, than that the plans which the surveyors drew and returned to the office, were kept there and were neither destroyed nor altered before the year 1798. If the owner of an estate, resolving to lay out a village, were to employ a surveyor and give him express instructions to lay out roads in certain directions, to mark them out upon the ground, as well as delineate them on a diagram, I have no doubt he might at any time before the public had with his assent adopted and used the streets, change the whole scheme of his survey, and alter the number and courses of his streets at his pleasure. Then if any of the king's subjects might thus alter his arrangement, on what principle of the common law (I am not yet considering our statute) shall the king be restrained from exercising the same discretion? The king is *parens patriæ*; he represents the public, he acts for their interests; it is one of the first principles of our constitution, that he is supposed to be always occupied for their good, and therefore it is that he is clothed with prerogatives to enable him the better to guard and promote the public interests and convenience. No presumption lies in any case that he has acted otherwise than from just motives; it cannot be assumed here; on the contrary it is evident, that all that was done was done with a view to the public convenience; the change of circumstances at this day cannot alter the character of this official act of the government, such as it was at the time it was resolved upon. If the king alone, because he is acting for the public, must be held irrevocably to abide by every arrangement of this nature, made often unavoidably upon imperfect surveys upon the first impression, the public convenience would be very ill consulted. I can find no principle (not yet adverting to our statutes) upon which the right could be denied to the crown to do all that was done in this case, and if what has been thus openly and publicly done were to be annulled after an acquiescence of thirty years, the greatest public evils and inconvenience might ensue in many cases, as well as injury to individuals.



The intention to appropriate this land as a highway was not in the first instance so unequivocal as in most other cases. Allowances for roads in a township, are generally directed to be made in explicit terms in the instructions ; no instruction to leave an allowance for a road in front of this township has been produced. It is not alluded to as a highway in any of the patents exhibited. It was never laid out, opened, adopted, or used by the public, and I am of opinion that such an adoption or acquiescence at least, if not user, are most material ingredients to constitute a binding dedication, according to the cases of *Rex v. Inhabitants of St. Benedict*, 4 B. & A. 12 Ea. 192, and several other authorities. On a careful perusal of our statutes, I find nothing in them to affect the decision of this question. The statute 33 Geo. III. c. 4, which has been long since repealed, applies, as its title declares, "to the laying out, mending, and keeping in repair the public highways and roads within the province;" what these public highways and roads were and are, is the very question. That statute authorises commissioners to regulate the roads already laid out ; it was passed in 1798, and has effect from the 31st May in that year. Clearly, therefore, as all that was done here, was done after the date of that statute, if it had amounted to laying out the space in question as a highway, this highway could not have been among the highways already laid out when that statute was passed, and therefore could receive no confirmation from the provision I have cited ; the same statute declares, that such roads as the commissioners shall thereafter lay out in the manner it prescribes, shall be common public highways ; and this is equally inapplicable to the case before us, since no commissioners laid out a road here. Indeed, from the whole purview of this statute, arguments may be drawn against this prosecution, but none that I can see in favour of it. With respect to the other statute, 50 Geo. III, it is only necessary to read it to be convinced that it cannot bear the construction contended for ; and indeed it is too monstrous a supposition to entertain for a moment, that the legislature intended to pass in 1810 an act, which should have the effect of making that again a highway which had been abandoned in 1798, and sold by the crown to

individuals. It is against law to give a construction to an act of parliament which will make it work such an injury by retrospection, but in reality the words of the act will not bear such an interpretation. It professes to comprise all allowances for roads made by the king's surveyors in any town, township or place already laid out, and surely the natural construction to give to this expression is, the allowances for road which existed, and as they existed, when that act was passed, not such as had been abandoned or altered before.

There are other points in this case; I find in all indictments for nuisances, the offence is the obstructing a highway along which his majesty's subjects were used and accustomed to pass, and the preventing their passing as freely as they before were accustomed to do. If this statement be not mere form, it would remain to be considered, how far an indictment can be sustained for a nuisance, when there had been no previous enjoyment, and could not have been from the circumstances, the road never having been opened; in other words whether a man can be indicted for a nuisance in obstructing a highway *de jure*, and not *de facto*. At least it may be said that the question would be raised with more obvious propriety, as it frequently is in England, in an action of trespass brought against any one, who, claiming the right of way, ventures to exercise it. This I am not at present prepared to decide, that if this had been clearly and expressly dedicated by the crown as a highway in 1798, the easement might not have been extinguished by an abandonment and non user for more than 30 years, and the general acquiescence of the public in the exclusive and visible occupation of the land by individuals. And at all events, it would become necessary in such a case to consider whether the defendants so occupying could be held guilty of nuisances. There are authorities bearing on these points, but I expressly decline giving a decided opinion on any other question than the principal one. I consider that if the space in question ever was a highway in law (for it certainly never was in fact) it ceased to be so after December 1798, and that on that ground the *postea* should be given to the defendants.

SHERWOOD, J.—Declined giving any opinion in this case, stating that he felt himself interested in the general question, as he owned lands in the town of York, with respect to which the same points might arise.

MACAULAY, J.—The king being the owner of the soil on which the highway is claimed, he could doubtless grant the fee simple to any of his subjects, and such grant would not be incompatible with the public easement asserted, unless the grant purported, and was intended to convey the estate absolutely without any such reservation. And the question here, is not whether the grants are void, but whether at the period of their issue, a common right of way subsisted over the premises, and if so, whether by the operation of such grants, or otherwise, such right hath been extinguished (*a*). The king's grant, when gratuitous, is to be construed most favorably for him; when for value, most strongly in favor of the patentee, for the honour of the crown (*b*). In the usual mode of laying out the organized portions of the province for settlement and grant, allowances for road have been made according to fixed rule, without regard in the first instance to the eligibility of the line pursued. Such allowances are made by the crown, not so much as an immediate dedication, as with a view to dedication; and admitting that the public may acquire a common right of way against the crown without grant by matter of record (which a mere allowance for road, although laid down on plans or surveys, certainly is not) the effect of a bare dedication is not susceptible of being governed satisfactorily by any universal or well defined rules. Whether a certain road constitutes a common highway or not, is generally a mixed question of law and fact, depending much upon circumstances, and the peculiar features of the particular case (*c*). It is not proposed therefore to lay down any general rules, but merely to apply such principles as appear clearly established, to the subject under consideration. As one of those principles, I think the crown, in questions of dedication, entitled to be regarded with an eye at least as favourable

(*a*) 2 Sco. 1004, 1 Burr. 136.

(*b*) 2 Co. 24; 8 Co. 145; Hob. 224.

(*c*) 2 Sto. 909; 5 Taunt. 134; 1 Vent, 189.

as a subject, if not more so ; and the opinion I entertain is formed by considering the present case equally, but not more favourably for the king than I should have done, had the matter arisen in relation to an individual. The mere allowances for roads were not, previous to 1810, regarded liable to be deemed highways by the Legislature, for the Statute 33 Geo. III. c. 5, and 44 Geo. III. c. 6, and others down to that period, provide that certain roads laid out, proclaimed, or opened, as therein mentioned, should be deemed highways, thus excluding the presumption that it was conceived all allowances were entitled to be so considered. These allowances being laid out upon a general system of survey, an implied right of change or alteration (considering the object for which they were made) might, if found impracticable or ill adapted to such object, be reasonably presumed, and the first step towards dedication might well be supposed to have been taken upon the reserved intention of altering the route, if found expedient, before actual use. Such a privilege would clearly hold in favor of an individual laying out his own estate for sale and settlement, even were the alteration adopted to gratify the owner's private views, although perfectly convenient for the use designed ; and I think an equal power and discretion reposed is in the sovereign, in laying out his province of Upper Canada for grant to his subjects, especially where the benefit and convenience of these subjects actuate the change. It will be found that dedications are often equivocal (a). An individual must in the first place dedicate, and his intention so to do must be clear ; time is considered an essential ingredient. The act or assent must be manifest and complete, and even then a subject could not, by any spontaneous act of appropriation, impose a highway upon the public. If a highway, the public or rather the inhabitants of the town or township become bound to repair it, and consequently the adoption and assent of those inhabitants become important (b). Such adoption and assent, in the case of allowances, are waived by the expenditure of public money in opening or repairing, the performance of statute

(a) 5 B. & A. 454 ; 5 Taunt. 135.

(b) Burr. 2, 594 ; 2 Bl. R. 687 ; 2 East. 362 ; 2 M. & S. 262-513 ; 4 B. & A. 450.



labour, user, &c. But without some evidence of adoption, as by user or other manifestation, an allowance for road at common law would continue an allowance only, and not a road in fact. Now, although by the course of the original surveys of the town and township of York, an allowance for road was made as early as 1793, still the public privilege contemplated remained in embryo, if I may so speak, and was not converted into a valid irrevocable easement by possession, user, repairing, &c. On the contrary, in 1798 it was deemed inconvenient; no steps had been taken by the public to render it practicable, and the government, with a view to substitute paramount advantages, sold the tract and altered the course of the projected road. The public at that period had not enjoyed it at all, and no grants of adjacent lots presented obstacles, out of which a vested public right might perhaps also have arisen. User is the most satisfactory proof of a highway. Yet if for want of actual settlement, an allowance for road dividing the concessions of a township, remained unopen after all or many of the lots on either side had been granted, the original dedication might on that account be considered irrevocably confirmed, and the public entitled to enjoy the same, whenever by reason of the increase of population, they should require the convenience provided. The original allowance indicating an intention to dedicate the grant of the adjacent lots, seems one mode of confirming such intention; the public user of the allowance, with the knowledge and assent of the crown, is another; and express grant of record would be a third; but without any such confirmation indicated by any step sufficient in law to bind an individual, I cannot find any legal authority to show that the king would be concluded or affected otherwise than a subject would be under like circumstances. Independent of the non-user and want of adoption by the public of the present tract, by reason of the natural impediments presented in reducing it to the use primarily contemplated, and of the revocation and extinguishment, so far as in the power of the crown, of the inchoate dedication by the actual sale and grant to the defendants, it will be found that a forbearance to assert a public right of enjoyment for a period of 30 years, materially influences the

question. So great a lapse of time is considered a tacit acquiescence or admission on the part of the public, that the right never existed, or if it did that it was extinguished by lawful means (*a*). Without resorting to any presumptions, I infer from the facts disclosed that no public right vested, or if any did arise, that it never was reduced to possession by user or otherwise, so as to establish a common highway, and that after 30 years adverse holding under the circumstances as they have existed, the public cannot now assert a right to the enjoyment of a highway over the land embraced in the indictment, by a criminal prosecution against the owners for a nuisance. The maxim that no length of time will legalize a public nuisance, generally holds, but as applied to a question of dedication, equivocal in itself, after a lapse of thirty years, without any public enjoyment either before or after suit, it forms a proper subject to be taken into consideration (*b*).

I do not think the 12th sec. 50 Geo. III. ch. 1, relates to any allowances for roads not subsisting as such in 1810. It could not upon just legal principles be construed to have the ex post facto operation contended for. The King could at common law sanction the change of common highways in long use upon a writ of *ad quod damnum*, and in this prerogative much will be perceived in principle to sanction his altering an allowance made upon his own territory, before any enjoyment or adoption, without any writ of that kind, were it necessary to rely upon any such analogies. The indictment represents the nuisance to be in the town of York, but the evidence would rather shew that the land composed a part of the township. However, as the judgment of the court is expressed upon the main point, such considerations are unimportant. From the best attention I have been able to bestow upon the matter, I am of opinion that, at the period of the sale in 1798, a confirmed irrevocable common right of way over the tract sold and granted by the king did not subsist; and, that under the circumstances as found, it was competent to the crown to preclude the establishment of such public easement over the premises, by the process of sale and grant;

(*a*) 12 Ves. 265; 2 B. & A. 663; 4 B. & C. 598-603.

(*b*) 7 Ca. 199; Cro. Jac. 446; 4 Esp. 111; 3 Camp. 227.

and that at this period, the owners of the soil under government patents, are not guilty of a public nuisance by reason of their having enclosed the same.

*Per. Cur.* Postea to the defendants.

### PARKER V. DUTCHER.

Declaration in assumpsit on a guarantee in the following form: "Please credit A. £100, and I agree to hold myself responsible for the payment of the same," and averment that plaintiff did credit A. : Held, that plaintiff must, under the general issue, prove such averment, and that calling a clerk who stated that such credit had been given, because he saw it entered in plaintiff's books, which were not produced, and which entry he had not made himself, was not sufficient to prove it. *Quære*, whether such an undertaking is within the statute of Frauds.

Assumpsit brought on a written undertaking in these words, "Please credit Mr. Frederick R. Dutcher the sum of 100*l.*, and "I agree to hold myself responsible for the payment of the "same." Signed by the defendant, and addressed to the plaintiff. At the first trial of this cause, after proving the instrument the plaintiff proceeded to shew that F. R. Dutcher was indebted to him in the amount of 100*l.* at the time of the giving this undertaking. The Chief Justice, who tried the cause, being of opinion that the terms of the instrument imported a future and not a past credit, and no evidence of any new credit given subsequently to the undertaking, nonsuited the plaintiff. On application to the court above, the nonsuit was set aside, and a new trial granted, on the ground that the instrument might have reference either to past transactions or to a credit to be subsequently given, and that the evidence should have been left to the jury to decide which was meant by the parties. On the second trial, after proving the defendant's signature, the plaintiff gave evidence to shew that F. R. Dutcher (brother to the defendant) was at the date of the instrument indebted to him in the sum of £100. His witness (a clerk of the plaintiff's) next stated that the plaintiff had given F. R. Dutcher credit in his books for 100*l.*; but he did not say when this credit was given, nor in what terms, nor did he produce the entry or account for not producing it. The plaintiff also offered evidence to shew, that the defendant when arrested made statements admitting this writing to have been given for his brother's debt. The defendant's counsel moved for a nonsuit on several grounds,

only two of which were afterwards spoken to. 1st, that the instrument is void for the uncertainty of its terms; and, 2dly, that the plaintiff has given no legal evidence that he ever did credit F. R. Dutcher to the amount of £100, without which consideration the instrument would be nudum pactum. The Chief Justice, however, decided on letting the case go to the jury, giving the defendant leave to move. The defendant then offered evidence to prove that a future credit was contemplated when the writing was given, and that subsequently to its being given, the plaintiff had still looked to F. R. Dutcher for the payment of his debt. The jury found for the plaintiff.

In Easter Term last, the defendant obtained a rule nisi to set aside this verdict and grant a new trial, on the ground that the verdict was contrary to law and evidence, and renewed the objections taken at the trial.

ROBINSON, C. J.—The first question that arises is, what is the obvious import of this undertaking? Does it mean, “please to allow F. R. Dutcher credit to the amount of 100*l*., on the account of which you now have against him, and I agree to hold myself responsible,” &c., or does it mean, “please to trust F. R. Dutcher (that is give him a new credit) to the amount of 100*l*., and I agree, &c.”? When the case first came before me, the latter construction struck me as being not only the most obvious, but as being the only construction which the instrument would bear; and I am inclined to think now, that supposing the words to be used in their most accurate sense, they refer to a future credit to be given. It appears to me, that *to give credit* to A. for 100*l*., and *to credit* A. 100*l*., are not perfectly synonymous in the apprehension of mankind in general, and that of the two expressions the latter has respect to a new credit more obviously than the former; but perhaps I am wrong on this point. I will remark, however, that Dr. Johnson gives to the verb “to credit” only two significations which can apply to any purpose for which it can have been used by these parties. The one is “to trust, to confide in” the other is “to admit as a debtor.” The former sense clearly applies to a confidence reposed and continuing, not to a discontinuance of



that confidence and the transferring it to another person. The latter sense "to admit as a debtor," precisely applies when the intention is to guarantee a credit to be given, i. e. admits F.R. Dutcher as your debtor to the amount of £100, and I will hold myself responsible. I am still under the impression, that when there had been no previous dealings, a letter written in the terms used by these parties, would be readily understood and accepted in ordinary cases as a request for a future credit to be given, and an undertaking to guarantee the payment; in other words that it would pass a letter of credit. I agree however with my brothers, that it is not necessarily to be taken in that sense; and I have been disposed to yield to the impression, that in common use the words would be taken as readily to apply to an existing account as in the other acceptations, and would very probably be used for that purpose. That being so, it would clearly not be right to turn the plaintiff round, by insisting that words which will bear naturally enough two interpretations, should absolutely be understood by the court in that particular sense only which is at variance with the plaintiff's claim. Indeed, in a case to which I alluded when this question was formerly discussed, Lord Ellenborough expressly notices that the giving credit may apply to a past dealing, as well as a future transaction. To conclude therefore that *ex vi termini* the one only can be intended, is not just, and that is the error into which I fell at the first trial, and which the second trial has given an opportunity of correcting.

The defendant, however, seems to carry his objection further, and to contend that the plaintiff cannot recover in this action, unless it is conceded that the instrument on which he sues will bear no other construction than that which he places on it. If the language be so indefinite, he argues that it may be applied either way; then the agreement is void for uncertainty, because parol evidence shall be admitted only to clear up doubts created by evidence of facts dehors the instrument, and not to remedy the loose terms of the instrument itself. The principle does not apply, I think, so strictly as the defendant contends, and it would be inconvenient and unjust that it should.

As it is expressed by Mr. Evans in his remarks on this subject. "Evidence which is calculated to explain the subject of an instrument, is essentially different in its character from verbal communications respecting it. It is a leading rule of construction, that all Acts are to be expounded according to their subject matter. Whatever therefore is an indication of the nature of the subject, it is a proper medium for construing the contents of an instrument, and a just foundation for giving it a construction considered *relatively* and different from that which it would receive if considered *abstractedly* from the circumstances with which it is connected." The cases in 1 T. R. 701, & 15 Ea. 272, illustrate this principle, and in the case before us the parties have used an expression which may be taken in either of two senses. We may therefore naturally inquire, under what circumstances the agreement was made, and a knowledge of these circumstances may perhaps seem to show us beyond all doubt what the parties intended. The evidence was properly received with that view. It went to establish very satisfactorily, I think, that F. R. Dutcher had been for some time in a course of dealing with the plaintiff, and that when this writing was given by the defendant (his brother), he was indebted to the plaintiff in 100*l.* and a few shillings over. From all the evidence, the jury were expressly called upon to say whether the instrument referred to an existing account or not; and they have found that it did. I see no reason for being dissatisfied with the conclusion they came to, and I therefore look upon the case now in the same light as if the agreement had said, please credit F. R. Dutcher 100*l.* on the debt he now owes you, and I will be responsible for the payment.

Then the next objection that meets us is, that it was not proved that the plaintiff did credit F. R. Dutcher in the sum mentioned; that the agreement declared on imports no other consideration; that a valuable consideration is necessary to sustain such an agreement; and that as no other is stated in the declaration, the existence of the alleged consideration must be shewn, or the undertaking must be looked upon as nudum pactum. The plaintiff seems to have been fully aware of this, for he has very explicitly averred in his declaration,

that he did credit, &c. The doubt is, whether upon the trial he gave any legal advice to prove that averment. I was of opinion that he did not prove this averment, but being desirous that the verdict should be so taken as to preclude the necessity of another trial, I contented myself with intimating the doubt, and I received the evidence that was offered, leaving its legal effect to be afterwards considered here. Having examined the point, we are all of opinion that the plaintiff gave no legal evidence in support of his averment, that he had given credit to F. R. Dutcher, and consequently that this verdict cannot be supported. Setting out of view the statute of frauds, and assuming that this case does not come within it, still proof that there was a consideration for this promise is not the less necessary. It was always so at common law, and the idea thrown out by one or two judges<sup>(a)</sup> that the doctrine of nudum pactum did not apply to undertakings in writing, has never been countenanced, and is expressly over-ruled<sup>(b)</sup>. To support such an undertaking, there must be a benefit to the promisor, or a loss to the promisee; and I do not in this case see legal evidence of either. With respect to any benefit to the promisor, it was not pretended there was any such thing. If it could be shewn that the plaintiff, relying upon the defendant's undertaking, had discharged the original debtor, that would have been loss to the promisee. That was the consideration which the plaintiff alleged, but he has not yet proved it; and after the discussion of this case, which took place after the first trial, it is singular that the plaintiff did not bring legal evidence to prove that he had discharged F. R. Dutcher, if such evidence were in his power. The attempt he made was this: he brought a witness, a clerk of the plaintiff's, who declared that the plaintiff had given F. R. Dutcher credit in his books for £100, but he did not say when this credit was given, nor in what terms; nor did he produce the entry, or account for not producing it. The credit may not have been given absolutely by the entry, nor given at all till after this action was brought, and at all events the only evidence which was given of the entry was really not legal

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(a) In 3 Burr, 1663.

(b) 7 T. R. 350.

evidence, since the book should have been produced, or its absence accounted for. The plaintiff, if he had unequivocally resolved to discharge the first debtor, might have placed his intention beyond doubt; he might have rendered an account to Frederick, or the defendant as his agent, and credited this sum as assumed by William; or he might have written to one or both of them in such a manner as to have discharged F. R. Dutcher. Any step of this kind would have been more satisfactory than an entry by himself in his own books, seen only by himself or his clerk, and at all times within his own power. Whether indeed such an entry of credit as was attempted to be proved, if it had been proved clearly, would have sufficed to prove the discharge for the purpose of this action, there having been no previous communication of the arrangement from the plaintiff to the original debtor, and no notice to the present defendant, is more than I am prepared now to decide; and as the evidence stands, that point need not be discussed. But it is argued, that although it may be said that no evidence was given at the trial to prove an effectual discharge of F. R. Dutcher, by any separate and collateral act of the plaintiff's before he brought this action, still the circumstances of the transaction are such, that they necessarily accomplished the discharge of F. R. Dutcher; that when the plaintiff wrote the paper declared on, and took it away with him, he assented to the condition which rendered it a binding promise on his part; and moreover it is said, that by bringing this action, and obtaining his judgment against the defendant, he does discharge his brother, and give the consideration required. However reasonable this may seem, if we were at liberty to argue this case apart from all authority, we must consider whether the consideration necessary, as I take, to make the promise binding when it is made, can be supplied in this manner. The case in 3 B. & C., 591, bears strongly on this point, and a pretty strong authority against it is to be found in the case in 1 Salk. 29, cited for the plaintiff, though it certainly makes very much against him. In that case, three judges out of seven in the Exchequer Chamber were against



the plaintiff's right to recover, not thinking that after verdict his case could be aided by inferring a promise to discharge, and regarding the case, which was very like the present, as one of mutual promises ; but it was clearly held, that if they could look at it only as a *promise* on the person assuming the debt, it could not bind except it was discharged. Now I certainly cannot look upon this paper as containing any promise of Parker ; such reasoning besides moves altogether in a circle. It is said, F. R. Dutcher is discharged because Parker has accepted the defendant's promise to pay the debt, which clearly supposes the promise to precede and lead to the discharge. Then when we come to the question, what is there to make this promise binding—was there such a consideration as the law requires ? the answer is, yes ! the consideration is, that Parker has discharged, or has agreed to discharge F. R. Dutcher. Now then the discharge which is inferred as a consequence of the new assumption, is supposed to precede it in order to furnish a consideration for it. The decisive question is, before this action was brought, what had the plaintiff done that disabled him from having recourse to F. R. Dutcher. I think he was not disabled, and I know not by what evidence that we have heard, F. R. Dutcher could have protected himself against his action, unless indeed two or three of the witnesses are to be discredited. Parker seems to have looked to F. R. Dutcher for payment of his debt (though not exclusively), after he had taken this writing ; and from the doubt which this evidence throws on the case, as well as the contradictions respecting the intent of the instrument itself, I am not sure that this case is in truth one of hardship upon the plaintiff. I have been inclined however to regard it in that light, and after the finding of the jury, the court would willingly have caught at anything that would support the verdict, but that we consider out of the question as the law is settled. A consideration for such a promise as this must be proved. The plaintiff has laid in his declaration that the consideration was his discharging the first debtor, and *that he did discharge him*. To that consideration he is held—we could

receive evidence of no other upon this record, and of the consideration which is averred he has given no proof. I am therefore in favour of a new trial without costs.

SHERWOOD, J. and MACAULAY J. concurred.

*Per Cur.* Rule absolute without costs.

### DOE EX DEM. HARLEY V. ROE.

Judgment cannot be entered against the casual ejector until four days have elapsed from the time the rule for judgment nisi is taken out of the office.

In this case the notice to the tenant was, to appear and plead within the first four days of term. The rule for judgment nisi against the casual ejector, was moved on the first day of term, but the judgment was entered before the expiration of four days from the time that rule was taken out by the plaintiff's attorney.

The court set aside this judgment as irregular, holding that the tenant has four days to appear and plead from the day the rule nisi is drawn up and entered, which entry cannot be regularly made until the rule is delivered out (*a*).

### KOYLE V. WILCOX.

Affidavit of justification cannot be sworn before the defendant's attorney.

The bail in this cause were put in and justified by affidavit taken before a commissioner who was employed by the defendant as his attorney, and whose name appeared on the face of the bail piece as the defendant's attorney, and a rule for the allowance of these bail being moved, the court held the affidavit of justification clearly irregular, in being sworn before the defendant's attorney, and held that bail ought not to be put in before the attorney in the cause; but as there was no rule governing the practice on this head, they made one to prevent it in future (*b*).

(*a*) Tidd. Pr. 8 Ed. 537-9; Adams on Eject. 218; 2 Archb. 49-50.

(*b*) Vid. 2 Y. & I. 284, where it was held an affidavit of service of a declaration in ejectment may be sworn before the attorney in the cause.

## PRENTICE V. HAMILTON.

In case for malicious prosecution, declaration stated trial before the Hon. L. P. Sherwood and A. Macdonell, assigned by his Majesty's letters patent, to them and others named therein directed, and the record put in evidence was of trial before the Hon. L. P. Sherwood, and others, his fellow justices, assigned by letters patent directed to him and others, and any two of them, of whom he was to be one : Held no variance.

Case for malicious prosecution. The defendant caused a bill of indictment for felony to be preferred against the plaintiff at the court of oyer and terminer, held in and for the Home District, on the 18th of April, 1828. The declaration in this cause alleged the court at which the trial of that indictment took place, to have been held before the Hon. L. P. Sherwood and A. McDonell, Esquire, assigned by his Majesty's letters patent, directed to them and others in the letters patent named, and that the court was held at York, on the 18th day of April, 1828. That the plaintiff was acquitted on the indictment at the same court. A copy of the record of the indictment was produced at the trial in support of the last allegation, and the copy of the record stated the court at which the plaintiff's acquittal took place was held at York, on the 18th day of April, 1828, before the Hon. L. P. Sherwood and others his fellows, justices assigned by letters patent to him and others, and any two of them, of whom he was to be one, without naming Alexander McDonell, Esq., at all. At the trial the defendant's counsel moved for a nonsuit, on this ground. A verdict was however given for the plaintiff, subject to the opinion of the court on this point.

SHERWOOD, J., after stating the case.—I think the evidence was sufficient. The gist of the action is the malicious prosecution ; and the real substance of the allegation is, that the plaintiff was acquitted upon that prosecution at the same court of Oyer and Terminer where it was commenced and carried on by the defendant as prosecutor. It is an allegation of substance ; that is to say, of the fact of acquittal, and the evidence in substance supports the allegation. It clearly appears the plaintiff was acquitted at a court of oyer and terminer and general gaol delivery, held at York according to law, before this action was brought, on a prosecution for felony, commenced and carried on by the defendant as prose-

cutor. A distinction between allegation of substance, and allegations of description, is established in the following cases, as well as in others; 9 Ea. 157; 2 B. & C. 2; 3 B. & C. 2.

It was held in Cro. Jac. 32, and the same doctrine was recognized in 2 B. & C. 4, "that where a declaration sets out a court which has authority to proceed, it need not exactly and precisely copy the style of the court." The declaration in the present case clearly shews, that the trial and acquittal of the plaintiff took place before the same court, and that the court was legally constituted, and competent to adjudicate on the matter before them. Alexander McDonell, Esq., might have been one of the court; the record neither establishes nor contradicts the fact, and I think it was not necessary it should.

Judgment should be entered I think for the plaintiff.

THE CHIEF JUSTICE, and MACAULAY, J., expressed no opinion.

*Per Cur.* Rule refused.

#### DOE EX DEM. MURPHY ET AL. V. MULHOLLAND.

A, lessee of the crown, verbally assigned his lease to B, who paid him for it, and went into possession of the land in the lease, and after some years died in possession, having received the original lease from A. A afterwards died, and the plaintiff, his administrator, brought an action of ejectment against the defendant, B's administrator; at the trial the plaintiff put in an exemplification of original lease and letters of administration, and the defendant having proved as above, and that after B's death the lease and other papers had been taken out of B's trunk, and the plaintiff had since stated it was in his possession, and proof of notice to produce the lease (which was not done), and the plaintiff produced it after the defendant's case closed, and the jury found for the defendant. Held, on motion for new trial, the jury were justified in presuming legal assignment of the lease, under the circumstances. Rule refused.

Ejectment for one hundred acres of Lot No. 16, in the 4th concession east of Yonge Street, in the township of York.

At the trial at the last assizes for the Home District, before the Chief Justice, the following facts appeared in evidence. An exemplification of the original lease was first put in, by which a term in the land was granted to one Michael Murphy, and letters of administration to Henry Johnson, of the estate of Michael Murphy. This was the plaintiff's case. For the



defence, a notice to produce papers was first proved, but nothing was produced. It was then proved that Michael Murphy and one Craven went together some years ago to York, for the purpose, as they were heard to say, to transfer the lease. Murphy said that he had sold the reserve, and had received fifty dollars for it, and ten more still remained unpaid. This sum was afterwards paid. Craven went into possession of the land, and died in possession. After Craven's death, Johnson was heard to say, that if Craven's heirs came forward they should have the land. Letters of administration to Craven's estate, granted after this action was brought, to Mulholland, the defendant, were put in. After Craven's death his papers were examined. The original lease for this lot was among them. Craven died about nine years ago. His chest was locked up, and the key taken away; the lease and his other papers were there in it. Afterwards the lease was in Johnson's possession; at least, so he stated to one of the witnesses, as well as that he had the transfer lease. Johnson made this statement during the assizes, and offered Mulholland, the defendant, £75, if he would make him a good title for the lot. The plaintiff's counsel then produced the original lease, but there was no assignment indorsed on it. The Chief Justice directed a verdict for the defendant, subject to the opinion of the court above, whether there was anything in the facts proved from which the jury could be warranted in presuming a transfer so as to rebut the plaintiff's legal right to recover. The case was argued last term, by Sullivan for the plaintiff, and Washburn for the defendant.

The opinion of the court was this day given by the Chief Justice as follows.—Clearly the assignment is required to be in writing; i. e. if there is any distinction between an assignment and a lease, it is that it may be necessary in the former case, when it would not be in the latter (*a*). Livery of seizin, if it had been clearly proved, could not have availed; neither would the bare possession of the lease, though the delivery over of title-deeds may create a lien in equity. I do not consider a demand of possession necessary, because it

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(a) 1 Camp. 317.

appears now upon the evidence that Mulholland stands upon a right which he had not when the action was brought, and that when the ejectment was brought he had no right. It cannot be made necessary by retrospect, that a demand of possession should have been made for a reason which did not exist when the ejectment was brought. If any man had a legal title when the ejectment was commenced, and before administration was granted to Mulholland, quoad that person Mulholland must be considered a trespasser entitled to no demand of possession; the question therefore is reduced to the main one, had the lessee of the plaintiff a legal title when this action was brought? As to the point whether a judge could object to receiving the patent in evidence for the benefit of Johnson, supposing it to be shewn that he obtained it by force or fraud from among the papers of Craven, to whom it is clear Murphy had sold the lot, and delivered the patent and possession of the land, having been fully paid his purchase money. If the justice of the case could be no otherwise sustained, I am not sure that such an interposition of the court to prevent a party gaining by his own wrong, might not be warranted upon principles established in other cases, though perhaps not upon the authority of any case precisely similar.

If A., having had a note or bond of B.'s for a sum of money, the same note or bond of B.'s should be afterwards seen by several in B.'s possession, and it should be proved that they had both spoken some time before of making an arrangement which should end in the cancelling of the note or bond; if B.'s papers should be plundered after his death, and A. should advance this very note or bond in court, in order to sustain an action upon it against B.'s executor, as if it were unpaid, I think the jury would be well warranted in concluding from the circumstances, and from A.'s conduct, that the arrangement had taken place which was to have resulted in the cancelling of the instrument, under such circumstances, unless he gave some account how it came afterwards into his possession. As to there being any evidence on which the jury should presume the lease assigned, I think there certainly was evidence, and such as ought to have led them to the conclusion they came to. It is sworn, and not contradicted in any way, that Murphy

sold this lease to Craven ; that he was fully paid for it, and that he put Craven in possession, who died in possession ; that they had gone to York to have the matter effectually settled ; that when Craven died, the king's lease was among his papers. What other papers were there is not known ; and there is no negative evidence that a transfer was not among his papers. I will not say that when possession had gone along with the patent a jury would have done wrong in presuming a transfer, if the evidence had stopped here ; but it was proved further, that the patent was abstracted from among the effects of the deceased, Craven, by breaking a lock and plundering his chest ; and this patent is produced by Johnson, the administrator of Murphy, without any attempt to explain how he obtained it ; and because by this robbery of the effects of Craven, a part of which have passed into his hands, the defendant (Craven's administrator) cannot shew what papers he did die possessed of, the jury is called upon to infer that he had no transfer. I think it much more reasonable, especially as against a spoliator, to infer that he had ; for whence the necessity of this outrageous act being done by any one, unless to suppress such a transfer ? The patent could be supplied at any time, by an exemplification from the registry ; and besides this, Johnson is proved to have declared his conviction that Craven had the best title to the land, for he told the secretary to the clergy corporation, that if ever Craven's heirs appeared, he would relinquish in their favour. This was admitting that Craven died possessed of the title ; and though he ignorantly imagined that the term descended to the heir, that signified nothing. Again, he is proved to have said at one time, that he had the patent and transfer ; and it was also proved that he lately offered Mulholland 75*l.* for the lot. It is impossible to say that in all this there is no evidence of the existence of a transfer ; on the contrary, I think there was ample evidence to sustain a presumption that there was a deed assigning the lease, though it has answered the purpose of the lessor of the plaintiff to suppress it. If however (what cannot be certainly known) the jury should have erred in their presumption of the affirmative, no injustice has accrued from their error ; because it is clear Murphy sold the lot, and was

paid for it, and retained no equitable interest whatever, though from ignorance or delay a deed never may have been executed. By throwing the benefit of this doubt into the other scale, the jury would have incurred the hazard of doing great injustice, by enabling a party to sustain a most unconscientious case. There is scarcely any rule of evidence so inflexible as not to bend to circumstances, and in such a case as this I recognize no distinction between law and equity. *Ex turpe causa non oritur actio*. *Omnia præsumantur recte esse acta*, and *Omnia præsumantur fortissime contra spoliatores*, are maxims of general application.

Here the lessee sold his term; he was paid for it; he put the vendee in possession; he meant to assign it entirely and effectually; of that there is no doubt; both parties went to York to close their transaction; the vendee dies in possession of the land; his chest is broken open and his papers pillaged; because the patent is only now to be found, and that patent in the hands of the administrator of the very man who sold the term, and is now dishonestly trying to regain it; is it to be inferred therefore that there was no assignment; I think not, on the principle *Omnia præsumantur recte esse acta*. I would infer that the parties did effectually that which they ought to have done, and intended to do; the jury ought, I think, to come to that conclusion, and on any other trial I should feel it right so to direct them.

Presumptions are avowedly not always founded on the conviction that, strictly speaking, the fact was such as is presumed, and especially this is correct when the object of the presumption is to support a just possession. In 1 P. Wms. 720, where a deed was suppressed, and no evidence of its contents in particular, the court in odium spoliatoris presumed it to have been made in such terms as would be most strongly against his interest, and most effectual in favour of the person claiming under it. There the presumption was wholly without evidence as to any thing specific, and from the misconduct of the spoiler, the court presumed what would best consist with the justice of the case. The case in 2 P. Wms. 748 et seq., is by no means against the presumption in this case, because there no evidence whatever



appeared to lead to the presumption, that such a deed was made, or to be made, nor was it a case of a spoiler, as the court determined. In 8 Ea. 262, it is said by Lord Ellenborough, that presumptions of this sort, when fit to be made, are made in favour of *the possession of those who are rightfully* entitled, and he adds, "the rule of presumption is *Ut res rite acta est*, and is applied wherever the possession of the party is rightful, to invest that possession with a legal title." In the same case Le Blanc, J., observes, "It is contended that the jury should have been directed to presume a recognizance of the legal estate from the trustees to Lord Byron; such a presumption may be made where it is necessary to clothe a *rightful possession with a legal title*, but the court must first see that there is nothing but the form of a conveyance wanting." Certainly in this case there was a rightful possession, and emphatically it may be said that nothing was wanting but the form of a conveyance.

It may be said that presumptions of conveyances are admitted only in confirmation of long possession, viz., twenty years or more, and that the case in 2 Bl. Rep. 1228, is on this principle. The argument may be just as applied to that particular case, but that is not the rule, as a consideration of the whole doctrine of presumptive evidence will shew. The cases in 7 T. R. 3, and of Doe ex. dem. Reade v. Reade, seem to me to bear strongly on the propriety of the presumption in this case, on the principle stated in 8 Ea. 262; in the case "Reade v. Reade, in particular, Lord Kenyon says, "I agree with what was laid down in Lade v. Holford, that when the beneficial occupation of an estate by the possessor has given reason to suppose, that possibly there may have been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume there is a conveyance of the legal estate; but if it appear in a special case that the legal estate is outstanding in another person, the party not clothed with that estate cannot recover in a court of law, and in this respect I cannot distinguish between the case of an ejectment brought by a trustee against his cestuique trust, and an ejectment brought by any other person."

All that is here said, and particularly the closing remark, seems to me to be strongly in point in the present case.

Length of time *merely* is not sufficient to found presumption of a conveyance upon; and on the other hand without length of possession, such a presumption may be raised upon circumstantial evidence. This comes under the description of natural presumption, which in truth is nothing more than *circumstantial evidence*; and as to these it is a general rule, that wherever there is evidence on which a jury have founded a presumption according to the justice of the case, the courts will not grant a new trial. A remarkable case to this effect is in 4 T. R. 468. Upon a consideration of this case, I have no doubt whatever that there was evidence to be left to a jury on which they might found the presumption that a deed of assignment was executed, and as they have found for the defendant, this certainly is not a case in which I would find fault with their verdict. The lessor of the plaintiff, who from anything that appears had no merits on his side, can suffer no real injustice if the jury upon doubtful evidence have happened to judge wrong, and if he desires to have the opinion of another jury, he can easily obtain it by bringing another ejectment.

SHERWOOD, J., and MACAULAY, J., concurred.

*Per Cur.* Rule for new trial discharged.

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#### VARY V. MUIRHEAD.

emblem on motion for a new trial after argument; the court will allow a new ground to be taken by the party moving, if the justice of the case require it.

Defendant's counsel, on a former day in this term, spoke to this case and urged in favour of this application to reopen the rule for a new trial in this cause, the following authorities: Doug. 797; 5 T. R. 436; 2 Sal. 647. He also spoke at some length as to the general question of the damages legally recoverable in this action.

The counsel for the plaintiff urged the preliminary objection, that it was not in the power of the court, at this stage of the cause, to allow the defendant to make any addition to the grounds originally urged by him for a new trial when he obtained his rule nisi.

There being a difference of opinion on this point, between

Sherwood, J., and Macaulay, J., the Chief Justice expressed his regret that having managed the case of Doe ex. dem. McNab v. Vary, out of which this action arose, and advised all those proceedings which terminated in ejecting Vary, he could give no judgment in this suit.

SHERWOOD, J.—At the trial, the plaintiff gave in evidence, as forming part of his demand for damages, the value of a dwelling house, and some out-houses which he had built for his own use on the premises, after he purchased them from the defendant, and before he discovered his title to be bad. No objection was made to this evidence by the defendant's counsel, and it went to the jury without any comment or direction on the part of the court, and with the apparent approbation of both parties as to its legality. After the argument on the application of the party for a new trial, and while the case stood for judgment, I was necessarily led to examine the cases on actions of covenant for title, and in the course of my reading on that subject, a doubt first arose in my mind of the right of the plaintiff, in an action of covenant for title, to recover the value of improvements; this doubt is not yet removed, and after having given my opinion in Easter Term last, on the motion for a new trial which had been made by the defendant, and was then pending, I stated my doubt to the counsel for both parties, and the court ordered final judgment to be stayed to this term, for the purpose of allowing time to the court and the counsel on both sides to look into the question, and for the counsel to argue it if they thought proper; the matter was accordingly spoken to. A preliminary objection was, however, taken by the plaintiff's counsel to the power of the court to allow the defendant to pursue this course; this objection must be disposed of before the principal question respecting the damages can be determined. The defendant complains that the jury made up their verdict in part on evidence insufficient in law, and consequently that the damages are too large. When this objection first suggested itself, I thought it unfounded, but subsequently, as before stated, I found reason to doubt, and that doubt continues; I have not yet been able conclusively to form an opinion on this point; I think, however, I should be

able to do so by next term. The question is altogether new in this Province, and I have not found any English decisions, in actions of covenant, which are at all satisfactory. The amount of the verdict would be materially affected, if the law should be found in favour of the defendant, for I think the jury most probably allowed £300 or more, for the buildings erected by the plaintiff; on the other hand a delay till next term could not be attended with much inconvenience, I should think, to the plaintiff, if the law were found with him. If the court at that time should be convinced that no damages ought to have been assessed for the buildings in an action like this for title, it should interpose its authority in my opinion, for the ends of justice, and direct the case to be taken before another jury. The court in advancement of justice might, I think, grant a new trial under the particular circumstances of this case, if they were fully convinced the verdict is against law and justice (a). These cases shew that the courts may in the exercise of a sound discretion, and under peculiar circumstances, grant a new trial at any time before final judgment in criminal causes. The same principle, in my opinion applies to civil causes; upon the whole, I think the entry of final judgment should be stayed till next term, for the reasons before stated. The greatest difficulty I have found in arriving at this conclusion is, that I cannot say the verdict is wrong, but only that I think its correctness doubtful; the doubt, I conceive, however, to be a reasonable one, although further investigation may possibly remove it, and I think it sufficient to justify a delay when so great a part of the verdict is in question. If the sum were trifling, I think the court ought not to interfere, but when it is large, and a doubt exists as to the justice and legality of the demand, I think the court should take sufficient time to examine all the authorities on the subject, but the consideration of other matters has occupied the attention of the court during the present term to such an extent, as to preclude the possibility of examining this with sufficient attention; still, I think the doubt should be removed, which it cannot be without further

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(a) Doug. 797, 799; 5 T. R. 436; Bull. N. P. 326.



time; I am quite ready to admit a more urgent necessity exists, for the spontaneous interference of the court in criminal than in civil cases, because the party interested may be a greater sufferer in the one than in the other, but the same principle of natural justice demands it in both; a man ought not to lose his property contrary to law, any more than his liberty, although the latter is more estimable than the former. The difference, however, in the importance of the right, is no argument against the existence of it in the one instance more than in the other; both are under the protection of the law, and consequently under the protection of the court, till the proceedings of the parties place them beyond the reach of judicial authority (*a*).

MACAULAY, J.—There is a wide difference between civil and criminal cases as respects the discretionary interposition of the court; in the latter case, the ends of public justice alone are sought, and the course of proceedings is always made subservient to that end, without regard to any laches or oversight in the party accused. If the court have good reason to believe that justice has not been done in a trial resulting in a conviction, they will interfere upon their own suggestion, or at the request of the prisoner, though out of time according to the ordinary practice. But in the former case private rights are contested, and opportunities are with scrupulous precaution allowed to both parties to meet and rebut the opposite demands, and to advance and sustain their own, subject, however, to the condition, that when the opportunity is suffered to pass unavailed, the door is shut against any recurrence to objections omitted to be urged in due season. Such will be found to be the general rule, and in the steady and due administration of justice, for which the courts in England are so justly and eminently celebrated, it will be found that if such rule has not been inflexibly adhered to, it has not been departed from unless under the pressing appeal of extreme circumstances in point of value and of merit. I will not, therefore, say that in no instance could the court with propriety open a rule or direct a renewed application

like the present in a similar stage of proceedings. If inadvertently a plaintiff had recovered a verdict for double his debt, as upon a first and second bill of exchange, as if they were both originals : if after refusing a motion for a new trial on distinct grounds, it appeared to the judge who tried the cause, that he had inadvertently allowed a verdict for a large sum in damages, which upon reflection and a reference to our authorities, he and the court were satisfied that the plaintiff had no legal or just right to receive, or the defendant to pay : I should hope the claims of justice would warrant and require the court to prevent such glaring wrong. But where, as in this case, there is nothing morally wrong in the plaintiff's recovering full indemnity for the losses he has sustained directly or indirectly, by reason of the defendant's invalid conveyance ; for the plaintiff will receive on the damages assessed, no more than he ought equitably to recover from some source, and it is by no means a clear and settled point, that the covenant declared upon does not, in construction, admit of reimbursement for beneficial meliorations, however questionable : and as the court do not at present see that the damages are obviously exaggerated, and such as the plaintiff has clearly no legal right to obtain in this or any other action against the defendant, and as the question has not been raised in the usual way to entitle the defendant to an adjudication upon it. I do not feel warranted in suspending the judgment or disturbing the verdict. The court, if perfectly satisfied, could hardly feel authorised in reducing the damages by *order*, without the plaintiff's consent ; and in sending the cause to another trial, the only result would be to afford the defendant an opportunity of receiving in a more formal shape and in a mode susceptible of appeal, a question at present doubtful, and the result of which upon more mature consideration, must be matter of conjecture, and could not with any certainty be anticipated. Under all these circumstances, I am constrained to hold, that the uniform and regular administration of justice in matters of private right and individual litigation, forbid a compliance with the indulgence prayed for at the suggestion of the court. I give no opinion on the main question. Its doubtful character deters me from assenting to its discussion or decision in the present stage of these proceedings. A concurrence in such a step, sanctioned only by a doubtful point of law, I could not but regard as an unwarrantable innovation upon established rules.

The court being divided in opinion, Draper took nothing by his motion.

THE KING V. SHERIFF OF NIAGARA, IN A CAUSE OF SCOTT  
AND MONTGOMERIE AGAINST W. L. DALY.

Where a sheriff returned cepi corpus, and was ruled to bring in the body, and attached for not obeying the rule, and the attachment was set aside for irregularity, and while it was in existence the defendant in the action had been discharged by supersedeas bail having been put in, but the rule of allowance was not served. Held that a second attachment against the sheriff on a second rule to bring in the body, issued eight months after the setting aside of the first attachment, and the debtor's discharge, was irregular, and the court ordered it to be set aside.

An attachment issued in July last for not obeying the rule to bring in the body of the defendant Daly, arrested at the suit of the plaintiffs. A motion was made in Michaelmas Term last, to set aside this writ, which was argued in that term, and again in Hilary Term, by the Solicitor General for the sheriff, and Draper for the plaintiffs. The court, however, set the writ aside, intimating to the plaintiffs that they might move again on the first laches. After the attachment had been ordered and while it was in the coroner's hands, the defendant Daly, who then was in custody, put in and perfected special bail, and got a rule for the allowance of such bail from the Chief Justice, who granted a fiat for a writ of supersedeas, by virtue of which Daly was discharged out of custody. The rule for the allowance of these bails never had been taken out or served. After the first attachment was set aside, the plaintiff took out another rule to bring in the body, and served it, and in Easter Term last, moved for and obtained an attachment for disobedience to this rule. And the Solicitor General moved to discharge this writ on the ground that the court could only look at the last rule, and as more than a year had elapsed since the writ issued and as the defendant had been discharged out of custody by a supersedeas, the plaintiffs were too late.

ROBINSON, C. J.—It is out of the question that we can do otherwise than set this attachment aside. The taking out a new rule to bring in the body, has entirely changed the circumstances, and it is obvious that the sheriff cannot legally be attached in 1831, for not bringing into court upon a rule then issued the body of a debtor, whom the court had discharged from custody in this same suit by writ of supersedeas, in July 1830. To say nothing of the delay the discharge of the debtor renders it impossible to attach the sheriff. The court never contemplated anything else than an immediate application in Hilary Term last, upon the old rule.

SHERWOOD, J.—The present rule to bring in the body was sued out about eight months after the sheriff returned cepi corpus on the ca. re. ; there is nothing before the court to prove that the sheriff, either directly or indirectly, induced

the plaintiff to stay his proceedings. The question now is, shall the attachment granted against the sheriff stand? He insists that the delay of the plaintiffs in the original cause, in suing out the rule to bring in the body, is not in the least degree to be imputed to him, and that he must be considered as virtually discharged from all liability in consequence of the delay. The cases in 7 T. R. 452; 1 Taunt. 111, and 3 B. & A. 204, seem to countenance this position. There is another objection to this attachment: the defendant in the original action was discharged by writ of supersedeas. It is true the plaintiff in the original action obtained a rule to bring in the body returnable in last Trinity Term, but he has apparently abandoned that rule, and sued out this in lieu of it; and although it might have been done by mistake, I think the sheriff has a right to consider the present rule as the only one, without further information on the subject, against which he is bound to shew cause: as he was not the least instrumental in leading the plaintiffs into error. It seems to me to be the misfortune of the plaintiffs, but not the fault of the sheriff. I incline, therefore, to the opinion that the attachment must be set aside.

MACAULAY, J.—I am disposed to treat the present application as if made under the original rule to bring in the body. I do not think it lies with the sheriff to object to any laches by reason of delay, for I consider that had the first attachment been regular he could only have been relieved upon forfeiting bail and the attachment standing as a security, a trial having been lost; and the inadvertent repetition of the rule to bring in the body owing to a misapprehension of the intimation of the court, and the effect of setting aside the attachment, afforded the sheriff a fresh opportunity to bring in the body or perfect bail, and free himself from responsibility. The delay was principally occasioned by an inadvertent error of the court. But as previous to the second rule to bring in the body the defendant was discharged out of custody by supersedeas, I am of opinion that that act of the court absolved the sheriff. The case in 2 M. & S. 562, shews that if the defendant render himself after the expiration of the rule to bring in the body, and if due notice be given, the plaintiff must recognise him so that he cannot afterwards issue an attachment; and although in this case the defendant appears rather to have been committed in June, 1830, upon the arrest of the sheriff, than upon his own surrender, yet by afterwards entering bail he submitted to, and acquiesced in such commitment; and although no formal notice was given to the plaintiff's attorney, still, when steps were taken to perfect bail in vacation, which could only be done in the event of the defendant being in prison, it was intimation enough to have



warned the plaintiff to watch, and if exceptionable, to object peremptorily to the measures taken with a view to bail and supersedeas thereon. No objection was made, and although from a want of a previous notice of the time and place, and the judge before whom the bail would justify and a supersedeas be applied for, I am not disposed to think the allowance of bail and order for defendant's discharge regularly obtained, independent of the error in the sum sworn as inserted in the bail piece, with other defects in the proceedings; I am of opinion that the court having allowed the bail (put in at the instance of the defendant, and not the sheriff) and granted a supersedeas which he has obeyed, he cannot now be attached for not bringing in the body; more especially while such supersedeas remains in force, not revoked or set aside. Had no supersedeas issued, it must be presumed the sheriff would have held the defendant in custody; and if so, his having him in charge would operate as a sufficient compliance with the second rule to bring in the body, when taken out; and the same circumstance would equally have induced a discharge of the attachment, had it regularly issued, although ordered, sued out and executed after the render of the defendant. I do not think the omission to give notice would have been an insurmountable obstacle, had no trial been lost; and had not the supersedeas intervened, notice might have been given early enough to have enabled the plaintiffs to proceed in time for the last assizes. In addition it may be observed, that from the indulgence alleged to have been sanctioned by the plaintiff's attorney on the first day of the arrest, and not answered or denied, and from the uncertainty when the attachment was placed in the coroner's hands, and the evident lapse of time between its receipt and execution, notwithstanding the discharge of the defendant, there appears a want of those prompt and regular proceedings which might have been observed. However as these minor circumstances did not of themselves in my view exonerate the sheriff, who was guilty of laches in not bringing in the body or perfecting bail in due season in the first instance, I am only prepared to relieve him on the ground that the intervention of the court, by the supersedeas, must excuse him from bringing in the body upon any subsequent rule, as well as from attachment under any former one. It is not necessary at present to decide whether the bail entered as for a sum sworn to of 500*l.*, are liable to that extent, so as to enable the plaintiff to proceed to final judgment, and take recourse against them should they fail to render the defendant pursuant to the terms of their recognizance; they have been allowed as good by rule of court, and that rule subsists.

*Per Cur.* Attachment set aside.

# THE UPPER CANADA JURIST.

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IN THE COURT OF BANKRUPTCY.

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EX PARTE STREET—IN RE RICHARDSON.

The examination of the bankrupt, in a case where the original creditor is dead, is receivable in evidence—but is not entitled to the same degree of credit, as if offered in evidence in the creditor's lifetime.—Adding a specific sum to an amount loaned which is payable upon a contingency, and which contingency is settled between the parties to be a risk worth five per cent. on the debt due, and charging interest and also five per cent. on the amount so added to the sum loaned, is usury. QUÆRE—Whether the Court of Bankruptcy has power to order void securities to be delivered up to be cancelled?

The facts of this case appear fully in the judgment.

*Baldwin, Esten, and Galt*, counsel for the Petitioner.

*Blake, and Hagarty*, counsel for the Assignees.

HIS HONOUR JUDGE BURNS.—The petitioner Street has presented his petition, stating, that he is mortgagee of certain steamboats called the Chief Justice Robinson, the Queen Victoria, and the Transit, which have been seized under the commission of bankruptcy, by virtue of certain deeds executed to him by the bankrupt, to secure the payment of certain sums of money, and praying that the usual order may be made for sale of the mortgaged property, and that the proceeds arising therefrom, be applied in satisfaction of the sums due; and if not sufficient for that purpose, then that he may be allowed to prove upon the estate for the residue.

The assignees meet this petition by a cross petition, setting forth that the securities mentioned in the petition were based upon other securities, previously given by the bankrupt upon the boats, first upon the Transit to Messrs. Clark and Street, and secondly upon the Queen and the Chief Justice to Samuel Street, Esq. That the securities upon the Transit and Queen, were founded upon usurious contracts, in the first instance—that the security upon the Chief Justice was composed in part of a sum transferred from the Queen—that the securities taken by the petitioner, were executed to secure the sums due on the former securities, and that they were also void as being tainted with usury, in respect of securing sums illegally charged by Messrs. Clark and Street and Mr. Street, subsequent to the giving of the first securities, made up interest and other charges, and stating that the whole of the securities are void, being made and executed upon a cor-

rupt and unlawful agreement and contract for the loan and forbearance of money at a higher rate of interest than six per cent. and praying that the petition for the sale of the boats may be dismissed with costs, and that the different securities may be ordered to be delivered up to be cancelled.

Upon these petitions the bankrupt has been examined *viva voce* by the assignees, and cross-examined by the petitioner, in order to establish certain points connected with the original agreements, and a great variety of letters, accounts, and documents have been produced by the petitioner, under a summons served upon him for that purpose. Although the petitioner has not been examined upon the petitions, he has made the usual affidavit, verifying the statements of his petition. An objection is made to the reception of the evidence contained in the examination of the bankrupt, involving two questions—first, whether the evidence of the bankrupt can be received in any matter for the purpose of determining a point at issue between the assignees and a creditor or claimant, so long as he retains an interest in the estate; or whether the disclosures he may make (for it is conceded that the assignees have a right to his examination) are only to be used for the purpose of affording the assignees a clew in establishing or obtaining the rights of the estate; and secondly, if his evidence be receivable, whether the present case is one where it could or ought to be received, inasmuch as the persons with whom the original dealings were had by the bankrupt are both dead, and the petitioner is only before this court in a representative character.

These questions may appear more important to us, than they would where the administration of the bankrupt law is more familiar, and perhaps even to ourselves more so at first sight than after a little examination of the different principles which govern in the courts of bankruptcy, and the modes of ascertaining the truth adopted in these courts, which is necessary for the purposes of decision. If the argument be correct, that the examination of the bankrupt can only be had for the purposes of information to the assignees, it would seem to follow that there could be no cross-examination by any adverse party, and there would be little use in contradicting statements by affidavits, or other evidence, if these statements were not evidence in any way. The question calls for some inquiry as to the principles of obtaining evidence, and the extent it is to be used after obtained, and how to be applied in courts of bankruptcy.

Many cases at law have been cited, to shew that the evidence of the bankrupt is not admissible; and on the other hand it is conceded, that if the present question were before a court of law, the bankrupt's testimony would not be received. When an issue is raised between parties at law there



is no examination of the parties themselves, or parties interested in the event of the issue ; the whole facts on both sides are to be established and made out by other evidence. Neither of the parties can be witnesses in their own favour, nor is the opposite side permitted to ask questions of his opponent. This principle of interest governs at law in rejecting the evidence of the bankrupt, on the ground that it is the general principle which those courts act upon in arriving at the truth, for the purposes of decision in matters before them. It is evident that thus restricted, it is a limited mode of obtaining truth, for the purpose of deciding a great variety of matters and transactions, which take place in the conduct of business between parties who are interested, and who perhaps alone can speak as to them. Hence it is that we find so many cases, in which the parties feel compelled to ask the aid of a court of equity to obtain evidence which cannot otherwise be had. A court of equity—as well for the purpose of assisting other courts in eliciting the truth for the purpose of decision, as of matters properly belonging to courts of equity, permits the parties to make witness in their own favour of their respective opponents, and by means of the bill and cross bill each party may become possessed of the knowledge the other has to the facts of the case.

Courts of bankruptcy embrace a compound jurisdiction, made up of both law and equity; yet still in the endeavour to obtain the truth, the principles of evidence are much further extended than in either jurisdiction. At law the facts must be established *aliunde* any examination of the parties. In equity, each opponent may make a witness for himself, or the other; but in bankruptcy a party is allowed to be witness for himself, and this position pervades the whole system and practice in bankruptcy. For instance, a creditor of the estate is only required to prove his debt upon his own oath; a person making a claim, and asking the aid of the court for any purpose, only swears to the facts himself; in either case no further evidence is required, unless something be suggested or stated, casting a degree of suspicion which calls for further inquiry. All parties, whether creditors, claimants, or bankrupt, and even his wife, who could not in any other court be compelled to disclose matters against her husband, are compellable to attend and give evidence. There seems to be no such question in the courts of bankruptcy, as that of interest to exclude parties; all seem to be receivable, and it is the duty of the court to endeavour to extract the truth therefrom. Not only do multitudes of cases, and every book of practice, prove this to be so, but the different statutes assume and recognize the principle, and in some instances enact it. Is there then any distinction between the examination of these parties being used for the purposes of information to other parties,



or for the purposes of decision ? The question is only put at present as respects the bankrupt, but if it may be put as to him, and it be a true principle to act upon, it ought not to stop with his examination ; it would equally apply as between creditors and claimants themselves, for each one is interested in cutting down the debt or claim of the other, in order that he may make the dividend so much the larger to those who remain. If such a principle of interest to exclude were to obtain, it might be found that the means of obtaining the truth whereby to administer the estate justly among proper creditors and claimants, would be much more limited in bankruptcy than would be desirable, and to such an extent as frequently to do great injustice, putting aside the question as respects the bankrupt. I am unable to discover that any such principle as the exclusion of the evidence of interested parties obtains in the Court of Bankruptcy; and as regards the statements of the bankrupt, it cannot be denied that they are evidence to a certain extent; the question is, is it true that they are only receivable for the purposes of information, but not for decision? From abundance of authorities, it seems to be clear that his examination has been received and put in opposition to that of a creditor or claimant, that is, evidence of one interested party to oppose that of another; and upon this decision has been pronounced. It is impossible to look over any book of reports, and not see cases constantly decided upon such evidence. Why the rule upon which courts of bankruptcy act, in order to elicit truth, was originally different from other courts, is not for me to enquire; but certain it is that such a distinction does now prevail, and, as one judge says, has prevailed for upwards of three hundred years. For my own part, I fancy I can see good reason for it. At law and in equity, where suits only raise certain points or issues to be determined between particular parties, it may be sufficient to obtain the truth from uninterested parties, or at farthest, from a party made a witness against himself; but, in bankruptcy, where the issues raised are not only depending between the creditor and the bankrupts, but also between all and every the creditors and claimants upon the estate, it is a far better rule that all parties should be witnesses, leaving the court to weigh the different statements, and give such credit as the different degrees of interest warrant, when contrasted with each other, or with corroborating circumstances or probabilities on either side. The true light to view the matter in bankruptcy, as it appears to me, is to consider every claimant or creditor as, or in the situation of, the plaintiff, and the estate in the situation of the defendant; and when thus viewed, it is easy to comprehend why all parties having claims upon the estate may be witness for themselves, and for and against each other. The points in litigation are

not between parties personally ; a creditor or claimant, when he invokes the aid of the Court of Bankruptcy, does not do so to settle a claim personally with the bankrupt, or with any other creditor ; but the question is raised between himself and the *estate* as represented by the assignees ; and the estate, as it were, causes the interest of parties to be put in opposition to each other, in order to ascertain the truth. A suit in bankruptcy is for the just administration of an estate among many claimants upon it—the law has taken the estate from the possession of the party, and placed it under the disposition of the court : he has no further interest in it than what the law gives him as to per centage or for the residue, and each claimant has an equal interest to make the estate available to pay his debt : therefore without an examination of all these interested parties, as well for the purposes of decision as otherwise, it might be found extremely difficult to deal with the estate justly. There seems to me no principle governing in courts of bankruptcy, which would exclude the bankrupt's evidence from being received for the purposes of decision ; and, among a multitude of cases upon the subject, the following more prominent than others, in some of which the question was raised, may be cited.

*Ex parte Symes*, 11 Ves. 525—the bankrupt swore that he deposited money with the creditor for certain purposes, and that he had no doubt it was applied accordingly, but that he did not know the fact—the creditor refused to disclose whether he received the money or how it was applied, and he was therefore not permitted to prove.

*Ex parte Fowles*, Buck, 98—the examination of the bankrupt was read to contradict an affidavit of a creditor.

*Ex parte Freeman*, 4 Dea. & Ch. 404—on petition to expunge a creditor's proof taken in the ordinary way, the examination of the bankrupt was read in evidence.

*Ex parte Bellwood*, 2 Dea. & Ch. 37—on petition to supersede the *fiat*, the bankrupt's affidavit was admitted to shew the *fiat* was fraudulently concerted.

*Ex parte Gwyn*, 2 Dea. & Ch. 12—the affidavit of the bankrupt was read in evidence on a question of usury.

*Ex parte Patrick*, 1 Mon. & Ayr. 385—the evidence of the bankrupt, as also that of the petitioner, was taken and read in opposition to each other upon a question of usury.

*Ex parte Lane*, 10 Jurist, 382—the bankrupt and the petitioner, who claimed as a creditor, were both examined *viva voce*, and upon their evidence alone the decision was pronounced.

*Ex parte Manners*, 1 Rose, 68—in this case the proof had been rejected by the commissioners, because the bankrupt in his examination stated that the bills of exchange (which were not stamped) had been drawn in London instead of at Haerlem and Amsterdam, where they purported to be drawn

—and against this rejection the bill-holders appealed. Sir S. Romilly urged, that as there was no other evidence of the fact than that of the bankrupt, the proof should have been received, or the bankrupt was incompetent on the ground of interest to increase his estate. The petition was dismissed, grounds not given, but it is clear that no effect was given to the objection.

*Ex parte Morley*, 2 Dea. & Ch. 50, may be mentioned as a case in which the bankrupt's evidence was rejected, but the rejection was on the ground that parol evidence would not be received to vary the terms of a deed.

These distinctions about the exclusion of witnesses seem to be fast disappearing, if not altogether done away with in England, and the inquiry after truth is being placed upon the proper footing. The statute 6 & 7 Vic. ch. 85, passed 22nd August, 1843, used the following language in its preamble: "Whereas the inquiry after truth in courts of justice, is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in commercial and in civil cases, should be laid before the persons appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony." I observe since this act, the bankrupt has been admitted at law where he formerly was excluded.

If any doubt, however, could exist whether the bankrupt's examination can be received, and whether he can be a witness, the 28th section of our statute of 1842, would seem to set the matter at rest. It enacts, that the judge may in his discretion require further proof on oath of any debt claimed before him, may examine the party claiming the same in his behalf, *and also the bankrupt*, on their respective oaths, in all matters relating to such claim.

The next question then is, whether this case is one in which the examination of the bankrupt should be received, the persons with whom the original transactions took place being dead, and the charge made that the contracts were usurious. On the one side it may be urged, that the 28th section makes no distinction as to the time when the bankrupt may be examined, or as against what persons, but it is that the bankrupt may be examined on oath on all matters relating to such claim; and in answer, it may be said that the clause vests a discretionary power, which ought to be exercised according to the known and established rules as to the admissibility of evidence in courts of bankruptcy. The argument is, that as the creditor is dead, the bankrupt's evidence would not be received upon a charge which might be capable of being rebutted by the creditor, or satisfactorily explained by him if he were in a position to confront his accuser. The



question is, whether this position of the parties is a sufficient reason for entirely excluding the testimony of the bankrupt, or whether the evidence is to be received allowing the circumstance of the altered situation of the parties to have its due weight in deciding the decree of credit to be given to it. With respect to the 28th section of the act, it ought in my opinion to be interpreted not to mean an unlimited discretion of requiring proof branching into matters wide of the question, and of compelling disclosures which by law would be protected, but it is a discretion to be exercised according to reason and authority, to obtain such evidence as reason convinces is necessary to obtain truth, and supported by authority as to the extent it may go.

Upon this question of usury, a different rule appears most certainly to be established in Bankruptcy, than either at Law or in Equity. In *Solomons v. Benfield*, 9 Ves. 84, Lord Eldon says, "Suppose a mortgage usurious, the creditor coming to prove in the ordinary way (he means upon his own evidence), every other creditor and even the bankrupt might present a petition, which he has a mode of verifying that is "not open to him upon a bill; the court upon his affidavit (that is "whether he be creditor or bankrupt he may thus verify his "petition) stating the usury, putting the creditor to answer, "and upon a principle quite different from that which obtains "in a suit, for a plaintiff in a bill could not offer to redeem "without paying what was due, but by the jurisdiction in "bankruptcy upon a petition supported by the oath of the "party interested unanswered, the security is cut down altogether, not leaving the party a creditor even for what was "actually advanced."

In *Ex parte Scrivener*, 3 V. & B. 14, Lord Eldon says, "At law you make out the charge of usury; and in equity "you cannot come for relief without offering to pay what is "really due, and must either prove the usury by legal evidence or have the confession of the party—but in bankruptcy it has been considered sufficient to suggest usury in "a petition supported by affidavits merely upon information "and belief—putting the party charged to prove against himself, for the purpose of not giving him his real debt, but of "cutting him off from all relief." In another place Lord Eldon has said, he was at a loss to comprehend why such a distinction should exist between the different courts, or why the court of bankruptcy should so far exceed the others, when at the same time it is said to be a compound of both; but the rule he says was established, and it was too late to alter it. It may be asked, why such a mode of ascertaining the truth upon a question of usury should have obtained? The reason to my mind is obvious, and far better expressed by Lord Eldon than I could convey my own ideas, not upon a question of usury, but upon one of penalties where the same reason gov-



erns. It is well established that a party is no more bound in a court of bankruptcy, than at law or in equity, to answer questions which tend to criminate himself, or subject him to penalties; and it would therefore be quite futile to expect the party upon this question to give compulsory evidence, but it is open to him to do it voluntarily if he will. In *Ex parte Symes*, 11 Ves. 525, which was a case of money being applied to election purposes, the party charged with the expenditure refused to answer, and he was cut off altogether; and Lord Eldon says, "The consequence of his refusal to tell whether he received money, and how it was applied, is not, that any court may say he has illegally applied it; but every court may say, if the party will not give that information which is necessary to decide upon a civil right, they must proceed upon that which is evidence, viz:—the bankrupt's oath that the petitioner did receive the money, and if he will not say whether he did or did not receive it, to get at the truth, I shall not tell him he is guilty, but the effect of not answering amounts to this, there is a purpose which makes it preferable to him not to place himself in that situation in which it is possible to ascertain the true state of the account." If the creditors were in this instance the petitioners, and we had no more evidence than what is now before the court, they would be precisely in the situation which these cases disclose. We come then to speak of those cases which apply to the altered situation. *Ex parte Burt*, 1 Mad. 46, is chiefly relied on to prove the necessity of having the bankrupt confronted with the creditor, that if the creditor be dead, the bankrupt's evidence will be rejected. I cannot say that I understand the language of the case to that extent, so far as the Court of Bankruptcy is affected. The effect of the case is this, I think, that inasmuch as the charge of usury is only made after the lapse of many years, on the oath of the bankrupt, not corroborated in any way, the question would not be sent to law, the usual way of deciding such questions. The affidavit would have been received in the Court of Bankruptcy *quantum valeat*, but under the circumstances of that case, no credit would have been attached to it. This must be the meaning of Sir Thos. Plumer, as I gather from the language of the whole case, though passages of the judgment would seem to be different. He is made to say "The bankrupt's evidence, he not having obtained his certificate and released his interest, would not avail either before the commissioners or a jury, for it would be to increase his estate, which would lead to great mischief." It can scarcely be supposed that he meant the bankrupt's evidence would be excluded before the commissioners on the ground of interest, for if it were so, that ground would be equally good to be raised in the creditor's life-time, and the

case of *Ex parte* Jennings, in the same volume, shews that Sir Thomas Plumer did not consider the ground of interest to operate as an exclusion, for he says "The allegation of a bankrupt as to usury, must always be received with great caution, otherwise great mischiefs might ensue. The assignees have brought forward no evidence except the bankrupt's affidavit, which is contradicted, and with strong circumstances of probability." Again, in *Ex parte* Burt, the language is. "As there is no testimony oral or written to prove the usury, except the deposition of the bankrupt, who is not a competent witness, it would be a useless expense to direct an issue." This must mean that he was not competent at law, and as there was no other evidence but the bankrupt's, and the court would never direct an issue, except where both parties were to be examined, or upon evidence irrespective of the parties, there was no use in directing an issue in that case. I apprehend therefore, in that case it must be considered, that as before the Court of Bankruptcy the bankrupt's evidence was receivable, though under these circumstances it would have availed but little, being unsupported. In *Ex parte* Burt it was said, "that after the examination of the bankrupt, the assignees might have procured the Commissioners to summon the representative of Scholey before them, and examined her as to the transactions, and whether there were any papers, accounts, or materials in her possession throwing any light upon the subject." What was suggested in that case, has been done in this, for a great variety of letters and papers have been produced by the petitioner, and the examination of the bankrupt has been had upon them. *Ex parte* Gwyn, 2 Dea. & Ch. 12, was a case very like the present; the transactions out of which grew the charge of usury had taken place between the father of the petitioner and the bankrupt. The elder Gwyn had charged the bankrupt a commission of 10s. percent. upon some discount dealings. The bankrupt had deposited a lease for lives as a security by way of equitable mortgage. The elder Gwyn died, leaving the petitioner one of his executors, who, after proving the will, petitioned the Court of Bankruptcy that the premises might be sold, and he made the usual affidavit verifying his petition. The assignees met this petition with the charge of usury, and supported it only on the affidavit of the bankrupt, as to this charge of 10s. percent. commission. The evidence was objected to on the same grounds as raised in the present case, and the same cases cited to sustain the objection; but Erskine, C. J. says, "With respect to the affidavit of the bankrupt in support of this charge, I think it was clearly admissible in evidence. If his affidavit, however, had been made in Mr. Gwyn's life-time, then the charge of usury might have been satisfactorily answered, because Mr. Gwyn himself

"might have made an affidavit that would have removed all imputation of the kind; and the court proceeded to dispose of the case upon its merits. Supported, therefore, by authority, and believing as I do that it would not be a reasonable exercise of the discretionary power to refuse the examination, I must hold that the evidence of the bankrupt is admissible in evidence; at the same time, as a court is a judge of fact, it is necessary to receive the evidence of interested parties, particularly where they cannot be contradicted, with jealousy and caution, to prevent mischiefs.

It has been suggested in this case, that as it has frequently been the practice to send the question of usury to be decided upon by a jury at law, that perhaps such a course would be adopted here. If I had the power I should gladly avail myself of it, for I should then feel my task comparatively light; but after giving the subject the best consideration I can, I am clearly of opinion I have no such power. Whether there does exist in this Province any power of obtaining the expression of opinion from a jury, in order to guide the decision in matters of bankruptcy, is not for me to say. I can only say what I think as to my own powers. Previous to the Statute 1 & 2 Wm. IV. ch. 56, which established the Court of Bankruptcy in England, the power of sending a case to a jury rested in the Lord Chancellor, who exercised it by virtue of holding the great seal. After the passing of that act, all original jurisdiction ceased to be exercised by the Lord Chancellor, and the opinion seems now to be that, in fact, the statute took away all original jurisdiction and vested it in the Court of Review. By the 4th section of that act, the Court of Review has power to direct any issue of fact arising therein to be tried by a jury before one of the judges of the Court of Review or a judge of Assize, and power is given to issue jury process in and by the 30th section. The commissioner's or subdivision court, has power to have an issue prepared and sent for trial before the chief judge, or one or more of the other judges of the Court of Review. When our statute was passed, I must suppose the Legislature not ignorant of how the law of England stood, particularly when by the 75th Section it is enacted that in all questions not otherwise provided for, the laws of Upper Canada shall be resorted to as the rule of decision in all questions respecting bankrupts; and in cases unprovided for in the existing laws then resort shall be had to the laws of England as such rule of decision. Our act is silent about any matter of fact being ascertained by a jury, but the judge seems to be the only judge of fact as well as of law, subject to an appeal. The 25th, 28th, and 34th sections, and the 34th section of the amended act, show this to be so. The power to send a matter of fact to be ascertained by a jury is but a mode of informing the court as to how the fact is, and if there be



reason to doubt whether a jury has come to a sound conclusion, the opinion of another jury may be taken. I should have great difficulty in bringing my mind to the conclusion that the 75th section gives the power by implication. "Resort shall be had to the laws of England as the rule of decision. Does that mean to comprehend also the modes of arriving at facts for the purposes of decision? Does not the act profess to give all the modes the Legislature thought necessary to obtain the truth, and does it not profess to say who shall decide upon those facts? If any mode be omitted which was contained in the English law, is not the inference to be drawn that it was intentional? And when the Legislature said the rule of decision was to be the same as in England, did it not mean that when the court had ascertained the facts in manner pointed out by the act, and judged upon what was a matter of fact, then that the decision in cases not provided for by the laws of Upper Canada, as to the law upon the facts so ascertained, should be the same as in England?

I feel it to be clear that I have not the power to avoid pronouncing upon a matter of fact if the parties put themselves upon my judgment. However painful and difficult a task it may be, to be called upon not only to administer the law as it is declared to be, but also to pronounce an opinion upon the acts and intentions of parties as they are believed or not to constitute particular facts, yet it is a duty which must be performed by some person or persons, and on the present occasion I regret that it is cast upon my own unassisted judgment. The probability is that a great hardship must fall somewhere; and when the decision on whom that hardship shall fall is to be based upon facts to be gathered and collected from the acts and intentions of parties, respecting which, as to whether they do or do not constitute facts, we find so many different opinions, I must say I have not that confidence in my own opinions I would otherwise have, and it requires a close examination to be at all sure that one is right as to his opinions.

The facts of this case as disclosed by the evidence and documents, appear to be these:—In the year 1834 Capt. Richardson then plying the Canada as a ferry packet between Toronto and Niagara, was desirous of constructing a new boat to supply her place; and in August, 1834, he wrote to Messrs. Clark and Street the following proposition, viz.—"If you think fit, from the insight the Canada's accounts give of the increasing value of the ferry she occupies, to enter partly into the speculation and to afford me your assistance, my proposal is this, viz: that, presuming this boat to cost from £7000 to £8000, each of you take £1000, share (more if you please), that other £2000 be taken up by one or two shareholders, in all £4000, that the remainder be reserved to give me the



"opportunity of taking it up for the benefit of myself, family, and connexions. But, as all the money I at present command is invested in the Canada, and proceeds from her profits, I should solicit Messrs. Clark and Street to make the needful advances for my part, that I may gain time to make up the money by the profits and sale of the Canada, or the assistance of my friends, and that this credit be extended to the term of three years from the commencement of the operations of the boat; that, in the meantime, the boat, the engine, and materials be assigned over to Messrs. Clark and Street, as security for advances made by them beyond the amount of their own shares; that upon all advances interest be charged until the vessel is in operation; that from the time she is in operation legal interest, with the addition of five per cent for insurance against lake and all other risks, be taken upon all advances. Messrs. Clark and Street to take the risk; that insurances be only charged upon advances and in proportion as advances are paid up, insurance to cease also." The same letter also contains the following passage:—"Should you think proper to decline entering largely into the speculation yourselves, if you support me with your credit and advances to make contracts, &c., upon condition already mentioned, I have no doubt I can raise the money in the ordinary way, and the knowledge of your backing me and holding the assignment of the vessel will facilitate greatly the operation." Capt. Richardson says this proposition was made in that way; that if it had been acceded to by Messrs. Clark and Street he should have felt himself bound to proceed with it, but this project of building was never acceded to by Messrs. Clark and Street, consequently neither of the propositions contained in the letter were ever carried out. Possibly a boat might have been built upon one or other of the plans proposed, or some plan of the same nature, but while the project of building was only talked of the steamboat Constitution came into the market, and Capt. Richardson says that he had conversations with Mr. Clark about advancing the money necessary to make the purchase; that Clark and Street were to have had £1000 stock in her in the event of a purchase being made; but, subsequently, he thought he could do better by having the boat all to himself, and he proposed that the money should be advanced, and he would pay Clark and Street six per cent. interest, and five per cent. insurance; and upon this Mr. Clark told Capt. Richardson to go on and close the bargain for the boat. He did so, and it appears wrote to Messrs. Clark and Street on the 30th of Dec., 1834, the contents of which are not before the court, but the reply to it we have under date of the 2nd of January, 1835, which contains this passage: "So far as you rely on our assistance, by which your purchase will be made of Mr. McNab for £1000 less than it could be effected

"on a credit, and probably that much less than the actual  
 "value of the boat, our money, which would be repayable by  
 "instalments, should be entitled to the benefit of the credit,  
 "inasmuch as that besides the interest we should be allowed  
 "the £1000 which you would probably rather give than that  
 "we should partake of such a share of stock in the boat as was  
 "talked of, particularly as you seem anxious to embrace all the  
 "interest in her to yourself. Whether the prospect of such  
 "a share as was contemplated that we should hold, be worth  
 "the £1000, you are better able than us to judge. If you think  
 "it is, and willing to give it, we shall try and make such  
 "arrangements as will enable us to have the £5000 available  
 "to you upon the execution of proper securities." On the  
 6th January, 1835, Captain Richardson replied to this letter,  
 and says, "I admit the justness of your claim to the benefit  
 "of the difference between a cash and credit transaction, yet  
 "it greatly alters my prospects. I have come to the conclu-  
 "sion, if you will add £200 in cash to be laid out in the  
 "outfit, so that I may not touch upon the £500 in reserve to  
 "be called for, making in all £5700, I shall be willing to  
 "acknowledge the debt of £6500 to pay maritime interest on  
 "bottomry bond of eleven per cent. thereon, with an instal-  
 "ment of £1000 per annum." This offer appears to have  
 been accepted; and by bill of sale, dated 17th January, 1835,  
 the boat was transferred to Captain Richardson in considera-  
 tion of £5500, paid for her by Captain Richardson; and on  
 the 21st January, 1835, Captain Richardson executed a mort-  
 gage to Messrs Clark and Street upon the boat, her name  
 having been changed to the Transit, to secure the payment  
 of the sum of £6500, which is recited in the deed that Capt.  
 Richardson had agreed with Messrs. Clark and Street for the  
 loan of, to be secured by an assignment of the boat. The  
 deed recites that it was to be repaid as follows: £1000 on the  
 21st Jan. 1836, and £1000 every 21st Jan. thereafter till the  
 whole sum be paid with interest on the same annually from  
 the date till the whole £6500 be fully paid—and in considera-  
 tion that Clark and Street should bear the total loss in case  
 the steamboat should be lost or totally destroyed otherwise  
 than by the default or negligence of the master or com-  
 mander, the said Capt. Richardson agreed to pay five per  
 cent. annually on the said sum so to be loaned in addition to  
 the six per cent. interest, as if the said loan had been secured  
 by a bottomry bond according to the maritime laws of Eng-  
 land. The deed contains a proviso to be void on payment  
 of the £6500 and legal interest and five per cent. on insurance  
 against total loss as aforesaid according to the agreement,  
 and contains a covenant on the part of Capt. Richardson to  
 pay the instalments at the times agreed upon, and in consid-  
 eration that Messrs. Clark and Street should bear the total

loss in case the boat were destroyed or totally lost as aforesaid, and that the deed should be void, thereupon convenated to pay the five per cent. annually upon the £6500, or so much as should be due, until the whole sum be fully paid up and satisfied. On the 26th March 1835, Capt. Richardson made some communication to Messrs. Clark and Street, the contents of which we do not know, but on the 4th April 1835, Mr. Clark replied to it, and he says, "Respecting payments, these you can make when convenient, into the Bank of Upper Canada here as you say, in sums not less than £200 to £300 at a time, and to bear interest at the same rate as that accruing on your bond; but as you cannot state any fixed periods for making payments, there ought to be a little time allowed to Clark and Street to appropriate the money you may pay in; I should wherefore say, that the interest on the payments you may make to the Bank, should commence in one month after paid in, and that you should notify Clark and Street by a line when the payments are made." On the 20th April, 1836, Mr. Street transmits his first account to Capt. Richardson, and in it various sums are credited as being paid before any instalments became due, and the credit of interest is only calculated on each payment, from one month after the same was made.—On the 29th April 1836, Mr. Street transmits a further account, and he says, "I now annex further statement of your account, shewing to your credit the reduction of insurance as understood in your turning in payments omitted in the account rendered on the 20th inst." In this account the reduction of insurance, is computed like that of the interest, commencing at the expiration of a month after each payment is made. On the 16th February 1837, Mr. Street sends a further account, the interest on payments computed in the same way, but the reduction of insurance, unlike the former, is calculated from the day of payment. On the 15th Feb. 1838, 9th April 1839, 27th Jan. 1840, and in 1841, other accounts are transmitted, in all of which the computation of interest on payments and reduction of insurance is made from a month after the payments respectively made. On the 10th Jan. 1843, Capt. Richardson and Mr. Street sign a memorandum on the back of the mortgage, and declare that upon an adjustment of accounts that day, the sum due on the security was £4441 3s. 6d. Thus far we have a history of the dealings respecting the Transit up to the 10th Jan. 1843, in which state things remained until the last security was taken.

It appears that in the year 1838, the steamer Queen Victoria, then owned by James Lockhart, Esq., of Niagara, was plying upon the same route occupied by the Transit; and on the 2nd Sept. 1838, Capt. Richardson wrote to Mr. Street proposing that she should be purchased, and in the letter is contained the following passage:—"And I am willing



“to add £500 to her value for the use of your money and credit, the whole to be estimated as her value, and the interest and insurance to commence on the whole as soon as the bargain is concluded.” On the 11th Sept. 1838, Captain Richardson again writes to Mr. Street, in which he says that Mr. Lockhart declines to sell, and he adds, “Therefore I have only to renew my thanks to you for the kind proffer of your credit and must wait events.” On the 1st October 1838, Capt. Richardson again writes to Mr. Street reminding him to induce Mr. Lockhart, the first opportunity, to dispose of the Queen Victoria in his, Capt. Richardson’s favor. On the 9th April 1839, the present petitioner writes to Capt. Richardson on the subject of purchasing from Mr. Lockhart, and he says,—“I have mentioned to my father your wish to purchase the steamer Queen, or the boat now building at the Niagara dock, but owing to sickness he had been unable to see Mr. Lockhart on the subject; and as it is likely that I shall have an opportunity, before my father, I will find out from Mr. Lockhart what his views are with regard to it—and if either are for sale, my father will be ready to assist you in the purchase.” This letter was replied to by Capt. Richardson on the 12th April 1839. On the 30th April 1839, Capt. Richardson writes to Mr. Street as follows: “I could not give you an answer about the Queen yesterday, as Mr. Lockhart would not formally answer me before he received her from government. This morning, at Toronto, I concluded the bargain with him to have her on paying him £2000 down, £2000 at six months with interest, and £2000 at twelve months with interest, and £1000 at eighteen months with interest, and with this understanding he has left her in Toronto in my charge. He will return from Toronto tomorrow with me, and if you can so arrange it that Mr. T. Street should meet us at Niagara to make some arrangements about the payments, the assignment may be made at once in my name, and the bottomry bond executed at the same time, perhaps the copying that of the Transit may answer the purpose.” This letter proves the price of the Queen, as purchased from Mr. Lockhart, to have been £7000. Mr. Thomas Street appears to have complied with the request of Captain Richardson, and attended at Niagara the day following the date of the last letter, for he is a subscribing witness to the bill of sale from Mr. Lockhart to Capt. Richardson, which transferred the Queen in consideration of £7000 paid for her, and dated at Niagara on the first May 1839; and he is also a subscribing witness to the mortgage from Capt. Richardson to his father, dated on the same day at Niagara, whereby it is recited that Capt. Richardson agreed with Samuel Street for the loan of the sum of £7500 to be secured by an assignment of the steamer Queen Victoria,



to be re-paid as follows : £1000 on the 1st May 1840, and £1000 on every succeeding 1st May, till the whole sum of £7500, with interest on the same annually, should be paid up; and in consideration of Street bearing the total loss in case the boat should be lost or totally destroyed, Capt. Richardson agreed to pay five per cent. annually upon the said sum, or so much as should be due. The deed contains proviso and covenant similar to the security upon the Transit. In 1840 an account of this transaction is sent by Mr. Street to Capt. Richardson, debiting him with the £7500 and a year's interest and insurance; and of the credit side of the account, credit is given for £500 paid into the bank of Upper Canada on the 20th May 1839, and £300 on the 1st August 1839. Interest is computed on these payments from the 20th June and 1st Sep. respectively, a month after payment made, and the reduction of the insurance is made from the latter time also. On the 6th April 1841, and in 1842, other accounts are rendered in which the credit of interest and the reduction of insurance is made in the same way. The last account shews the balance due to be £7569 6s. 4d. on the 1st May 1842. During the year 1842 the Chief Justice was being built, and large advances were made by Mr. Street for the purpose; and from an account filed, it appears that these advances were blended in the same account with the transactions respecting the Queen; and on the 10th Jan. 1843, a statement of accounts appears to have been made up respecting both, and the amount due on the Queen was then £8401 18s. 10d. computing up to 1st May 1843, and the advances made towards building the Chief Justice with interest was then £4635 6s. 11d. Captain Richardson swears that £3401 18s. 10d. of the amount due on the Queen was transferred to the security on the Chief Justice, and that fact is corroborated by Street's accounts shewing it. On the 10th Jan. 1843, Capt. Richardson and Mr. Street signed a memorandum on the back of the security on the Queen, declaring that upon an adjustment of their accounts it was found that the amount due reduced to £5000 upon the Queen. On the same day Capt. Richardson executed a mortgage upon the Chief Justice for securing the sum of £9037 5s. 9d., being composed of the sum of £3401 18s. 10d. transferred from the Queen, the sum of £4635 6s. 11d. the amount of advances to build the Chief Justice, and the sum of £1000 to be paid by Mr. Street in June following. This security in its terms is precisely like those upon the Transit and the Queen, except that insurance was reduced to four per cent., and the instalments to be paid are £2000 each. On the same day Capt. Richardson executed to Mr. Street an assignment of a bond which he held from C. Widmer, with a condition, that in case Capt. Richardson paid £900 within twenty-one years from the 16th Jan. 1841: and in the mean-

time kept certain premises insured during that period, and which were leased by Widmer to Richardson for the same period, then that Widmer would convey and assure the premises to Capt. Richardson. The assignment of this bond recites that Capt. Richardson was largely indebted to Mr. Street, and being willing in part security of the debt to assign the bond does so in consideration of 5s. absolutely and unconditionally. There is contained a covenant in the instrument on the part of Capt. Richardson to perform the agreement entered into by him with Widmer, and a power of sale given to Capt. Richardson, reserving the proceeds to Mr. Street. A letter of Mr. Street, dated the 9th Dec., 1842, is proved to shew that the assignment of this bond is connected with the transactions about the boats.

So far, we have a history of the different boats to the 10th Jan. 1843, and in this position the parties remained until the 4th Sept. 1845, in the meantime Mr. Street having died, leaving the petitioner his executor—Mr. Clark had died many years before. On the 4th Sept. 1845, Capt. Richardson executed new securities to the petitioner, one upon the Transit to secure the payment of the sum of £5224 8s. 3d. at interest, from 21st Jan. 1845, and the second upon the Queen and the Chief Justice, to secure the payment of the sum of £15,255 6s. at interest from the 1st May 1845. These deeds respectively recite the former mortgages, and that Capt. Richardson had become the registered owner of the boats under the recent statute passed in 1845. By these deeds the respective insurances of five per cent. and four per cent. were dropped, and the different debts were no longer subject to the contingency of being lost, but the different transfers were to be subject to the provisos for payment of the sums of £5224 8s. 3d. and £15,255 6s. respectively, as in the recited deeds were contained. These instruments contain no covenants for payment of the monies respectively, and they refer to the former deeds, in which the covenants were only contingent. So far therefore, these latter instruments are inaccurately framed, but I suppose that, inasmuch as the intent must have been in consequence of discontinuing the insurance for risk to render the payment of the sums certain, and no longer subject to the contingency, that such a construction of the two taken together would be put on the whole, as to effectuate that intention. There does not appear to be the least discrepancy between the facts stated by Capt. Richardson and those furnished by the written evidence, and for all purposes of decision I should say the written evidence would of itself be sufficient. The original purchase of the Queen was for £7000, as appears by the letter already stated and the bill of sale of the boat. The security given upon her was for £7500, and

Capt. Richardson says in his examination, that he agreed to give Mr. Street the £500 upon this transaction, in addition to the eleven per cent. for the use of the money; that the proposition came from himself and not from Mr. Street, but Mr. Street agreed to it and it was included in the security. With respect to the risk, Capt. Richardson says, that the risk of running a boat daily between Toronto and Niagara was not much; that in offering five per cent. for insurance, he did so to induce Clark and Street to lend the money, he himself did not consider the risk worth so much, and he thought they would not lend the money at simple interest. Again he says, he informed Clark and Street when he was about to borrow the money, that the risk he considered nominal—he himself considered it so trifling, that he never insured the boats himself—the greatest risk is in the winter from fire when the boats are laid up, in consequence of heedlessness of the persons taking care of them—he stated, he says, to Clark and Street, that the risk was so trifling that they would find it to their advantage to take it at five per cent. on the amount loaned—he held this out to them, and offered it as an inducement to obtain the money, and he had no doubt that if he had not offered to give the five per cent. he would not have obtained the money from them.

These facts appear to present the following points for decision:

1st. Whether the original transactions respecting the Transit and the Queen do not partake rather of the nature of a sale and resale, than that of a loan of money and security given for it.

2nd. Whether the deeds of the 4th Sept. 1845, or either of them, are void on the ground of usury, inasmuch as the accounts shew, that the reduction of the insurance, and the computation of interest on payments made on account of the different securities upon the Transit and Queen, were not made or computed or allowed until one month after being made, these securities being but for the purpose of securing the amounts due on the footing of the balances of the original account.

3rd. Whether the deeds of the 21st Jan. 1835 and 1st May 1839, or either of them, are void on the ground of usury, as—

1st. On the ground that there can be no such thing as bottomry in its proper maritime sense in this Province, and that the risk inserted is only colourable to enable the parties to take more than six per cent. interest, there being in fact no risk in this case; or

2nd. Whether including the sums of £800 in the one security and £500 in the other beyond the sums actually advanced, and charging interest and insurance upon them as provided by the deeds, was an additional sum to be secured



on account of a *bona fide* risk incurred; or whether it was merely to obtain a larger rate of interest than six per cent.

4th. If the original deeds be valid on the ground that a *bona fide* risk was incurred which was sufficient to cover the provisions for payment of five per cent., and also the respective sums of £800 and £500, then whether the deeds of the 4th Sept. 1845 can be supported, inasmuch as thereby the payment of the £800 and £500 was rendered certain, and no longer dependent on the contingency.

With respect to the first point, my opinion is, that neither of the transactions respecting the Transit or the Queen can be held to be a purchase by Messrs. Clark and Street, or Mr. Street, and a sale to Capt. Richardson. In his examination Capt. Richardson repudiates such an idea, but I am not in the least governed in my opinion by what he says. In a case like this, where the bankrupt cannot be confronted with the creditors, all statements made by him which are ideas and opinions only, should not be treated as evidence;—if they were supported by facts, then the facts would be sufficient themselves—if unsupported they go for nothing. If Mr. Street were here himself, he might say his ideas and opinions were altogether different, and he might be able to give sufficient reason for thinking him right. In this case I found my opinion upon facts, which Mr. Street, if he were here, could not controvert on his own evidence. In the letter of the 2nd January, 1834, before referred to, which was written before the bargain was finally made about the purchase of the Constitution, Mr. Street says, “We perceive you have in fact concluded a bargain with Allan N. McNab, Esq., for the steamboat Constitution, rested principally upon our approbation, and advancing for the payment of £5000, which appears to be immediately needed, other £500, the remainder of the price, to remain in your hands, as a security against demands, if any there should be against the boat.” It can hardly be imagined, that if Clark and Street were to be the purchasers, or if Captain Richardson simply acted as an agent for them, that £500 of the price of the boat was to remain in the hands of Capt. Richardson. The natural supposition is, that they would themselves have retained it for their own security. Mr. Street says, “So far as you rely on our assistance by which your purchase will be made,” and again, “We shall try and make such arrangements as will enable us to have the £5000, available to you upon the execution of proper securities.” It is hardly possible to apply these expressions, when coupled with the other, to mean otherwise than the loaning of money, which was to be secured. This letter we find followed up by a bill of sale to Capt. Richardson, dated 17th January, 1835, and four days after another deed executed by Capt. Richardson to Clark and Street, in which it is recited that Capt. Richardson had



agreed with Clark and Street for the loan of £6500, to be secured upon the boat. This deed speaks all through as of the matter being a loan. I know it is not uncommon in instruments of this nature to recite the matter different from what it really in truth is, and if I found reason to suppose a transaction was different from the way it was recited in a deed, in a case where a party would not be estopped by the deed, I should not be inclined to place much reliance upon such a recital; but when I find the recital to agree with the other acts of the parties, and in accordance with what we believe to have been their intentions, then I do look upon such a recital as affording strong corroborating testimony of the fact; we must believe them to have understood what they were doing and the effect of it. With respect to the Queen, there are some passages of the letter of 2nd Sept. 1838, which do favour the idea that Capt. Richardson was soliciting Mr. Street to be the purchaser of her, and some passages which militate against that idea, further than that if the purchase were made, it was to be made by the money being loaned to Capt. Richardson, for he says, that he is willing to add £500 to the sum which may be paid to Mr. Lockhart, and for what? "for the use of your money and credit." On the 1st October, 1839, Capt. Richardson writes to Mr. Street, to use his interest to induce Mr. Lockhart to dispose of the Queen in his favour. On the 9th of April, 1839, Mr. Thos. C. Street writes to Capt. Richardson, "I have mentioned to my father your wish to purchase the steamer Queen," and again, "if either are for sale, my father will be ready to assist you in the purchase." After the bargain has been made by Capt. Richardson, he writes to Mr. Street to make arrangements for Mr. T. Street to meet him at Niagara, to complete the arrangement, and he says, "the assignment may be made in my name." All this is followed up by a transfer executed to Capt. Richardson, and a mortgage given to Mr. Street, in which it is recited, and the deeds speak all through, that the £7500 was a loan. It appears to me no other conclusion can be arrived at, and that it was a loan of money by Mr. Street to Capt. Richardson, to enable him to make the purchase.—In both instances, who was the person desirous that the purchase should be made? Would, so far as we see, Messrs. Clark and Street, or Mr. Street, have made the purchases of themselves? Can it be said Capt. Richardson merely acted as their agent? I think all the acts of Capt. Richardson shew that he always considered himself the purchaser; and I think all the acts of Messrs. Clark and Street, and Mr. Street, shew that they considered they were loaning a sum of money to Capt. Richardson, and were taking security for it.

The next question is, whether the deeds of the 4th of Sept. 1845, or either of them are void? To commence with the one securing £15,255 6s. upon the Queen, and the Chief

Justice. I do not think this deed can be impeached on the ground that it was usurious to be charging interest on the whole sum due, and only crediting interest on the payments from a month after being made. There does not appear to have been any expressed or explicit understanding had between the parties respecting the mode of crediting interest on the payments made upon the Queen, as there was in the case of the Transit ; but I find the accounts kept with respect to the Queen precisely in the same manner as those of the Transit, rendered from year to year, and no objection made, at least so far as we know. I think it is not assuming too much to believe there was a similar understanding in the case of the Queen, as that of the Transit, and it is to be remembered that from May 1839, both accounts were going on in the same way. Before proceeding further, I think it necessary to determine what the parties meant by the term *interest*, as used in the letters. Mr. Clark in his letter says, "I should therefore say that the interest on the payments you may make to the bank, should commence in one month after paid in." Now what did he mean by this ? Is it to be understood that he meant the whole eleven per cent ? It may be said that the manner of making the credits proves such to have been the case, for the reduction of the five per cent. insurance is also made from a month after payment. If this expression is to be understood as applicable to the whole eleven per cent., then it would appear to be open to the argument, that dividing the eleven per cent. into six per cent. interest, and five per cent. insurance, was a mere cloak, and it is thus the question is pressed upon me. I do not look upon the expression as meaning anything more than legal interest, and that such is the construction to be put on the letter seems to me beyond all question, for Mr. Clark says, "respecting payments, these you can make when convenient into the Bank of Upper Canada here, as you say, in sums not less than £200 to £300 at a time, and to bear interest at the same rate as that accruing on your bond." When the bond is referred to, nothing more than legal interest is chargeable, and I think he meant that rate to be credited. Insurance and interest are quite distinct, and different things, as I shall have occasion to shew. Such being the proper definition to give to the term interest, which I think the reasonable one, the next inquiry is, as to the understanding upon which interest was to be credited on payments, and the legality of the mode adopted in this case. —The agreement originally made was, that Capt. Richardson should pay £1000 on the 1st of May, 1840, and £1000 on every 1st of May after, with the interest annually. Now, instead of making the payments at the regular stated periods agreed upon, Captain Richardson appears to have desired that he might pay at irregular periods, and as suited his conveni-

ence, in such sums as he could. In the case of the Transit, Mr. Clark says, "but as you cannot state any fixed periods for making payments, there ought to be a little time allowed to Clark and Street, to appropriate the money you may pay in," and therefore proposes that interest should not be credited upon the payments, until a month after paid into the bank. This understanding seems to have been acted upon in the case of the Queen, for we find £500 paid on the 20th May 1839, and £300 on the 1st of August, and interest credited from a month after. These payments were made before anything was due on the principal, or the interest, but so far from the original agreement being complied with as to payments, we find that on the 1st of May, 1840, the £1000 with interest and insurance on the whole sum, was greatly in arrear. The following year several payments were made, but still at the end of the year, the deficiency was still greater. I must say, I see nothing unreasonable in the understanding the parties have acted upon, namely, instead of exacting payment of large sums at fixed periods, they should substitute the taking of smaller sums at such irregular periods as suited the convenience of the party to pay, allowing a rebate of interest on the sum due, so far as regarded the sums paid, from the period of a month after being paid. If such an arrangement had been originally entered into for the purpose of giving the party a greater than six per cent. interest, it would doubtless have been usury; but when such an understanding is entered into to vary a previous agreement in order to suit the convenience of one party in paying a debt, not obliging him in any way to it, but leaving it optional with him; and in order to place the other party upon a fair footing, and enable him to make his arrangements so as not to have his money idle; I cannot see anything either unreasonable or illegal in it. The lender agrees to receive his money at irregular periods, whenever the borrower finds it convenient to pay, instead of at the regular stipulated periods; and, as the price of such convenience, the borrower agrees that interest shall continue on so much of the money borrowed until one month after the payment of the sum in part paid. Persons in the habit of lending money, stipulate for re-payment of principal and interest at stated times, and of course depend upon payments made at those times for the purposes of re-investment; but when the borrower, after he has entered into his arrangement to pay at such periods, finds it inconvenient to him to pay in that way, and applies to the lender, for the indulgence of paying in such small sums, and at such times as he can, I see nothing illegal in the lender telling his debtor, that inasmuch as he takes his money in that way, and has to run the risk of reinvestment, he must stipulate for a month to expire before interest shall cease upon the sums so paid. If he be able to



re-invest before the expiration of the month, then he may be somewhat the gainer ; if longer than that time expire, then he is the loser ; but he takes that risk at the allowance of a month. It does not appear to me there is any difference upon principle between such a case, and that of a banker, who keeps an account with his customer, in which he is in the habit of discounting bills for him, and carrying proceeds to account. Though large payments may be made, and balances remain in hand far more than sufficient to pay the amount of the bills, and though not a shilling of the discounts was ever drawn, and the whole sum remained in hand, it would not be usury. In both cases the borrower pays for money he never has. It may be said that the customer of the bank may draw his money when he likes, and so it is voluntary on his part to have it ; so it is voluntary in the other in not paying at the day stated.

The next question upon this point is, as to the not crediting the reduction of five per cent. for insurance until one month after the respective payments made. Let us see what the contract is between the parties as respects this. "The deed is, that in consideration that the said Samuel Street bear the total loss in case the said steamboat should be lost or totally destroyed, otherwise than by the default or negligence of the master or commander of the said steamboat, the said Hugh Richardson hath agreed to pay him the sum of £5 annually upon every £100 so to be loaned as aforesaid, in addition to the 6 per cent. per annum above reserved, as if the said loan had been secured by a bottomry bond according to the laws of England," with a covenant on the part of the said Hugh Richardson, as follows, "that he shall and will, in consideration that the said Samuel Street shall bear the total loss should the said steamboat be destroyed or totally lost as aforesaid, and that these presents shall be void thereupon, pay or cause to be paid to the said Samuel Street, his executors, administrators or assigns, £5 annually for every £100 of the said loan of £7500, over and above the 6 per cent. per annum thereon reserved as aforesaid, until the whole sum be fully paid and satisfied." This transaction is not bottomry, for in the case of bottomry, the premium does not become payable unless the principal sum loaned becomes payable ; the one shares the fate of the other ; and though parties may stipulate for a certain fixed sum as a per centage, monthly or otherwise as may be agreed upon, yet it does not become payable until an event has happened, and if the event never happens, then the whole is lost, and neither principal nor premium becomes payable. In this case, the parties have said they had agreed about the matter as if the sum had been secured by a bottomry bond according to the maritime law of England. Yet I apprehend this



expression cannot place them in that position, in direct opposition to the covenant to pay annually a fixed sum for the risk; and it can only be interpreted to mean, I think, that the parties were entering into a contract of the nature of bottomry, in which it was intended the principal sum should be risked, but that the premium for that risk should be paid. The covenant is an absolute covenant, for the payment of 5 per cent. annually so long as the boat continued safe; but in case she were lost, the whole sum of £7500, or such sum as might remain unpaid would be lost, and this was to continue till the sum should be paid up. It is in fact a wager from year to year; that is, Capt. Richardson risked 5 per cent. on the amount due against the amount due, that the boat would be lost within the year; which wager Mr. Street took, agreeing that if the boat were lost he should lose his debt, whatever that might at the time be. In determining, therefore, whether there be usury as respects these charges and credits given, it is necessary to determine at what time this five per cent. wager became due or payable from Captain Richardson; whether before the risk commenced, or at the end of the year. I should say the true way to view the matter is, to treat it as an insurance on Mr. Street's part, which is what I think the parties understood; that is, Mr. Street, in consideration of being paid 5 per cent. per annum on the amount due, insures the safety of the boat from year to year so far as his debt was concerned; and if the boat should be lost, then his debt was forfeited. If this be so, then did not the premium become due immediately upon the risk being entered into? I think it did, because the very foundation of insurance is the payment of a premium. In consideration of the payment of a premium by one party, the other undertakes to make good or to guarantee against a loss. Here Mr. Street guaranteed Capt. Richardson against being called upon to pay the debt if the boat should be lost within the year, on the payment of 5 per cent. premium on the amount at the commencement of the year so long as anything remained unpaid. I think this premium was due at once, and might have been sued for if necessary, without waiting till the end of the year. Then, as each year commenced, the risk was begun: and being entered upon, it seems to be well established, that in such case there is no apportionment of the premium; that if the risk be once begun, though it should immediately cease, still the premium shall be paid (*a*). For this reason, therefore, without considering other questions made, it is my opinion that Mr. Street was not bound, for anything disclosed in the deed, to make any reduction of the premium on any payments made in the year for any portions

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(a) *Tyrie v. Fletcher*, Cowp. 668; *Loraine v. Thomlinson*, Doug. 585.

of that year, after the year's risk entered upon. It is true, by the accounts it would appear as if charged at the end of the year, like interest, but because Mr. Street may have chosen to charge the premium in account, and not to have made an account of it till the end of the year, I cannot see that it would alter his rights. He seems to have charged it as he did the interest, but there is a wide distinction between payment of premiums of insurance and payments of interest; the latter is only due when the debt becomes due, or annually, if the parties stipulate for it; but the former is payable *instantly*. I have looked over the deed repeatedly, but I cannot discover anything to oblige Mr. Street to wait until the end of the year before he would be entitled to call for the premium. Suppose, however, that taking the accounts, and Mr. Street's letter of the 29th April, 1836, in which he says: "I annex further statement of your account, shewing to your credit the reduction of insurance, as understood in your turning in payments," in connection with Captain Richardson's letter of the 9th August, 1834, in which he says: "that insurance be only charged upon advances, and in proportion as advances are paid up insurance to cease also;" that thereby an understanding or agreement was constituted between the parties; that reduction of insurance should be made as the accounts shew were computed; yet, is there any thing to shew or convince us that the reduction was to be made sooner than a month after the risk as to a particular part ceased? and can we say that Mr. Street has done anything contrary to the understanding? It appears to me, if it can be said there was any binding agreement between the parties respecting this reduction, it was one altogether to the advantage of Captain Richardson; and if the understanding was, that Mr. Street should return to Captain Richardson a proportionable part of the premium, all that we can say about it is, that he kept his word and did return it to him. I am therefore of opinion that the deed of the 4th Sept., 1845, securing the sum mentioned upon the Queen and the Chief Justice, cannot be impeached upon this ground.

For the same reasons I do not think the deed of the 4th Sept., 1845, securing the sum of £5224 8s. 3d. upon the Transit can be impeached; but in addition to this I am somewhat inclined to agree in the position taken by the petitioner's counsel, that as the sum secured by this instrument is much less than the original sum, it must be all looked upon as principal money. It appears to me I should have no right to look into the manner of keeping the accounts under such circumstances, to pronounce the deed void. The usual way is to apply monies paid to sink the interest and other charges first, before applying it to the principal. It is true it may be

said in answer, and perhaps it might be successfully contended, that in a transaction like this, where accounts have been rendered from year to year, showing how the matter stood between the parties from time to time, and when it is found that for several years the payments have exceeded the interest and charges, and the remainder has been applied, as of course it ought and must be, to sink the principal, that in subsequent years, when no payments have been made, by means whereof the accumulated interest and charges have again swelled the amount due to a considerable sum, though less than the original debt, that it cannot be said the whole sum then due is principal money. It may be that principal once so paid is to be considered so in future, and that interest becoming due afterwards is not to be treated as converted into principal. It is sufficient to say, I think, the deed cannot be impeached for the reasons I have given, and therefore I express no opinion about this question.

The next question is, whether the deeds of the 21st Jan., 1835, and 1st May, 1839, or either of them are void. Whether bottomry can or not exist in this province in the maritime sense, I need not inquire into, for as I have before said, my opinion is that this is not bottomry in its proper sense. Is this transaction void on the ground that the risk inserted of five per cent. was merely colourable, or as the means of obtaining a greater rate of interest than six per cent.? On this point the evidence of Capt. Richardson has been taken, and also some other evidence which is unimportant. What Capt. Richardson states in his opinion, and if Messrs. Clark and Street were present, they might tell me their opinion was very different. This point being matter of opinion, and no other evidence offered to me than that of the bankrupt, I should not feel myself justified in adopting his opinion. In a case where parties are situated as at present, I do not think such evidence should be acted upon. It is evident to me however, even from Capt. Richardson's evidence, that there was some risk, and it is quite impossible that I can say that five per cent. for it was so far beyond calculation as to raise the presumption that it was colourable, and unless it amounts to that it is of no consequence though it was twice as much as stated or even more. Are these deeds then void, on the ground that in the one £800 and in the other £500 have been added to the sums respectively professed to be secured? To commence first with the security upon the Transit: I have already said that in my opinion the transaction must be looked upon as one of a loan of money, and security given for it. That a sum of £800 was added to the amount actually advanced to pay for the boat is beyond all question, and the inquiry can only be, why was it? It is here that I have to deal with the subject in the same



light that a jury would, and we must inquire into the intent and motives of the party. Was this sum included for any other purpose than of securing a greater rate of interest than the transaction would justify? If it was included as a reward for the risk run, it would not be usury unless it were only colourable. One way in which it is put is, that it was in consideration of Clark and Street giving up their right to any stock in the boat as proprietors. I am at a loss to discover what right they had to any stock—if they had been giving up something which they had paid for, or a valuable right which they could have insisted upon, it might have been different. Had they taken stock or shares it must have been paid for, but they had no stock—no boat was purchased, they were not giving up anything—it was all in imagination. Mr. Street himself says it was only talked of, it was contemplated they should have a share. Then another way it is put is, that the £800 was part of the risk they ran upon the actual advances of £5,700. If so, then it may be asked why they computed the risk at five per cent. only? This sum seems to have been contemplated between the parties as quite sufficient for that purpose. It is true that the £800 was risked as well as the other, but was it inserted on account of that risk? If the risk was thought to be more than the five per cent., is it not natural to suppose that instead of closing the matter upon the basis of eleven per cent., we should have heard of their demanding a greater rate? Instead of complaining that the rate for the risk was too low, or that £800 or any other sum should be added for additional risk, we have Mr. Street in his letter saying “As the purchase of the boat would be made for £1,000 less on account of paying cash, our money which would be repayable by instalments should be entitled to the benefit of the credit.” Was it to be entitled to the benefit on account of the risk run, or was it for the use of the money loaned? The money was contemplated to be repaid by instalments, and the deed provides for it in that way, consequently the £800 is spread over the whole period. Taking it proportionably over the whole time, it would amount to £114 a year nearly. If it be a reward for the risk, and to be computed in that way, then as great a sum would be paid for the risk in the last year, when only it was contemplated to have £1000 in jeopardy, as for the first year, when £6,500 was jeopardized. If it was not to be treated as spread over the whole, then in what instalment is it to be considered as belonging? It is easy to comprehend such a bargain as made in *Lord Chesterfield v. Sir A. Janssen*, but I am at a loss to devise a scheme upon which to fix this sum of £800 as a reward for the risk. It is easy to comprehend their calculation of five per cent.



on the amount due, and had they said that in addition to it the £114 yearly should be paid for the risk, the difficulty, might, perhaps, have been got over, although I do not well see how ; but instead of doing so, the £800 is added to the actual advances, and made to bear six per cent. interest, and five per cent. insurance charged upon it. If the £800 is to be considered as a reward for the risk, the bargain between the parties must have been this:—£5700 is to be actually advanced, and to be repaid with legal interest and five per cent. annual insurance for the risk of its being lost—but in addition as a further reward for the risk, £800 is to be paid with interest also upon that, and five per cent. insurance for the risk of that not being paid also—that is, interest and insurance upon a sum of money not a shilling of which was ever advanced. Suppose the deed had recited the transaction as thus analysed, can we believe that the parties would have entered into the agreement ? Or if they had signed it, would not such an instrument be pronounced void, as affording proof upon the face of it, that the contingency inserted about the loss of the boat, formed no ingredient between the parties. Speaking of what was talked about a share in the boat, Mr. Street says, “Whether the prospect of such a share “as was contemplated that we should hold, would be worth “the £1000, you are better able than us to judge.” There is not a word here about risk, and what is it that Mr. Street was asking the £1000 for ? Does not he himself say that it is for the prospect of the share it was contemplated they should hold ? The offer to Capt. Richardson is no more than this—we were to have had a share, that was contemplated when the matter was talked over ; you have partly made a bargain for the boat, and now you want her to yourself ; we have no objection to give up the prospect of that share, but if you depend upon us to loan you the money to pay for the boat, we should have the difference between a cash and credit transaction, which would probably be £1000 ; if, therefore you expect us to give you the money, you must give us the £1000 for that prospective share, and if you agree to give it, we will make arrangements to have the £5000 available. In answer to this, Capt. Richardson agrees to it, but reduces the sum to £800, though he says it had greatly altered his prospects. He does not complain that he has been asked to pay a larger sum on account of the risk, but I should say the meaning is, that the purchase of Clark and Street’s prospect at so great price, had greatly altered his own. I cannot look upon the letter otherwise than negating any claim to the larger sum for risk. When the sum is agreed to be given, it is made principal money, as if it were subject to interest and insurance. I feel it impossible, de-

ciding a fact as a jury would do upon the evidence, to bring my mind to any other conclusion than that the securing the payment of the sum of £800 by the deed was a mere colour, and that it never entered the minds of any of the parties that it had any thing to do with the risk. My opinion, therefore is, that the deed of the 21st Jan., 1835, is void in law.

The next question is with respect to the deed of the 1st May, 1839. Before the Queen was purchased, Captain Richardson wrote to say that he was willing to add £500 to her *value* for the use of the money. When she was purchased the petitioner was present on the behalf of his father; he is a subscribing witness to the transfer to Captain Richardson, and to the mortgage to Mr. Street, executed on the same day. As between his father and the parties now before the court, he might have been examined as a witness, and I can see no reason why he should not as it is—he could not demur to answer. The case of *Ex parte* Burt shews he might have been examined. When we find him writing about this transaction, as shewn by his letter, and finding him conducting the matter for his father, it is not, I think, presuming too much to believe, that he could have explained why this £500 was added to the mortgage. Although he has not been examined, yet it was perfectly competent for him to have met the examination of the bankrupt by a denial of what he asserts. He has not contradicted it; and what inference can be drawn from his silence, than that it cannot be denied. As respects this sum, there was no prospect in the Queen to sell; and therefore it was impossible to justify adding it to the £7000, except on the ground of the risk run. I must say that if it had been exacted or given on account of the risk, the plain way to do it was to spread the amount into a per centage, and thus have made the rate so much larger than five per cent. The parties not having dealt in that plain way with respect to it, I cannot do otherwise than conclude there was some other object in view than a reward for the risk. I am therefore of opinion that the deed of the 1st May, 1839, is void in law.

I need not express any opinion upon the fourth point, further than to say, if I had entertained a contrary opinion as to the transactions of the £800 and £500, and if I had thought the including of those sums could be justified on the ground of a *bona fide* risk, then I must, I think, have held the deeds of the 4th September, 1845, void. The accounts of the Queen shew that, down to the taking of the last deed, not a shilling of the original amount (£7500) was ever liquidated. This last deed converted the contingent debt into a certain one; consequently the £500 was thereby made payable at all events. The fact, however, of making it certain

at that time, goes far to convince me that the parties never thought that the risk run had any thing to do with the payment of it. With respect to the Transit, it may be said that the reduction of the sum to £5224 8s. 3d., being less than the actual advances, that the parties considered the £800 as paid; but the answer to that is, that if the £800 was a sum to be paid as a reward for risking the whole until paid, then as soon as the debt was rendered no longer subject to the contingency, it was received as a reward for having risked the amount due up to the 4th September, 1845—a position, I should say, not one of the parties ever thought of.

I have not noticed the point made about the security on the house. It was not necessary to do so at present, and might only embarrass the case, for it remains to be considered in another way.

The effect of my opinion, therefore, is this, that no security exists upon the Transit at all; that the deed of 21st January, 1835, being void, so must also be that of the 4th September, 1845; that no security exists upon the Queen—avoiding the one deed destroys the other; and that the deed of the 10th January, 1843, securing the sum of £9037 5s. 9d. upon the Chief Justice, being composed of part of the amount secured upon the Queen, is void also. The last deed would be void under any circumstances, if I am correct as to the £500 being a mere colour; for the sums due on the Queen and Chief Justice are amalgamated together into one sum of £15255 6s., and secured as much upon the one as upon the other.

Whether any debt be provable, growing out of these different transactions, is not for me to say positively at present. I incline to think that it will be found that the advances made to build the Chief Justice are provable as a good debt upon the estate of the bankrupt; and that the petitioner may not be debarred from offering proof of these in the ordinary way, I shall reserve the right to him to prove for them if he thinks proper. I am warranted in taking this course by *Ex parte Grouchy*, 3 Mon. & Ay. 27, S. C.; 2 Dea. 79. In this case the court urged upon the party the propriety of consenting to an order to prove, under circumstances like the present case; and finally the order was made by consent. I think, however, the court would not have asked the parties to consent, if the case of *Gray v. Fowler*, 1 Hen. Black. 462, had been brought to the notice of the court. It was there decided, upon an issue sent from the Court of Chancery in a bankrupt case, that a good debt was not to be lost by being blended with a vicious one.

The petition for the sale of the boats must be dismissed, reserving the right to the petitioner, if he thinks proper, to



offer proof for a debt upon the advances towards building the Chief Justice; but upon the principles laid down by Lord Hardwicke in *Lord Chesterfield v. Sir Abr. Janssen*, 2 Ves., I think it must be without costs. The petitioner, being an executor, had a right to the opinion of the court upon his securities; and though he does not succeed, yet it seems he shall not pay costs.

It remains now to be considered in what manner the cross petition is to be dealt with. The assignees ask the securities to be ordered to be delivered up to be cancelled. This, of course, raises the direct question as to the jurisdiction to make such an order. Those cases where the court has exercised jurisdiction over the messenger, and over the assignees as respects the bankrupt's property, appear to me to have no application in the present case. The ground of exercising jurisdiction over them was because they were officers of the court. The point in this case is, whether a person has submitted himself to a jurisdiction to the extent asked for here, by asking the court to sell property in the possession of the assignees, upon which he claims to hold a security. *Ex parte Ainsworth*, 3 Mon. & Ay. 451, is relied on; but I think a distinction may be drawn between that case and the present. There the deeds had been deposited by way of equitable lien, and the deeds themselves remained the property of the bankrupt; and if there was no lien, then the party had no right to detain the property from the assignees—there was a property in the deeds belonging to the estates; here a legal mortgage is created by the deeds—the deeds themselves are not the property of the bankrupt, they are the property of the holder, and what the assignees have is a right to avoid them. Whether the authority of *Ex parte Ainsworth* would be now upheld, is not for me to say; but I think it most probable it would be, on the ground that the person having the actual property in his possession, and invoking the aid of the court as to it, that it would be held he had submitted to the whole jurisdiction which might be exercised over it. In the present case it is not asked to exercise jurisdiction over the property itself; that is already in the hands of the assignees; but it is asked to do what always seems to have been a branch of the jurisdiction of the Court of Chancery, namely, to order void securities to be delivered up to be cancelled. It is argued, because the Court of Bankruptcy has entertained a petition for specific performance of an agreement, that it is not a greater stretch of power to order a deed to be cancelled: *Ex parte Sidebotham*, 3 Dea. & Ch. 818, is referred to. It will be seen in that case that the sale was one under the order of the court; and, if anything could be held to have conferred jurisdiction on the court, that was a



strong fact to prove it. Another case, *Ex parte* Barrington, 4 Dea. & Ch. 461, might have been cited, which is strong to the same point; and that case was upon appeal to the Lords Commissioners. *Ex parte* Brittel, 2 Jur. iii. S. C.; 3 Mon. & Ay. 534, is another case decided in the same way. The latter case was decided in 1838; and there seems to have been a growing inclination from time to time gradually to increase the powers and jurisdiction of the Court of Bankruptcy, and to extend it over all matters connected with the estate to be administered; that is, not only the Court of Bankruptcy should administer the estate when in possession, but also should exercise all the powers and jurisdiction for the purpose of reducing it to possession, and to settle rights connected with it. It is evident, upon tracing the reports, that there has been an assumption of power from time to time in the courts of bankruptcy, made in the way I have mentioned. An instance may be given of the extent of power a commissioner thought himself clothed with, in *Ex parte* Llewellyn, 8 Jur. 816. A solicitor had a deed in his possession belonging to the bankrupt, upon which he claimed a lien for business done for him. He was summoned to attend before the commissioner, to be examined touching the estate of the bankrupt, and to produce the deed. He did so, and the commissioner at once decided that he had no lien, and ordered him to give up the deed. The solicitor refused to obey the order, and the commissioner ordered the messenger to seize the deed, which he did. The chief judge says—“With respect to the deed the commissioner had no power to take it from the solicitor; the suit of clothes in which he went to court might as well have been taken from him, for certainly the commissioner had as much right to the one as to the other. An action of trover was as it were commenced, tried, a verdict given, and execution issued, without the intervention of a jury or sheriff, by a commissioner in bankruptcy. Such a course of administering justice is new to me.”

These cases respecting specific performance came under review of Lord Cottenham, upon appeal, in 1838, in *Ex parte* Cutts, *Re* Goren, 2 Jur. 391, S. C.; 3 Mon. & Ay., 549; 3 Dea. 242. The cases were all cited and commented upon by Lord Cottenham, and he distinctly over-rules the court having such a jurisdiction. He seems to think, however, that in cases where parties have had distinct notice of the jurisdiction, and that they were rendering themselves liable to it, and submitted to it, that they would be bound. He says, “The acts of parliament that have been passed relating to bankrupts, confer no jurisdiction over strangers who do not seek and take the benefit of proceedings in bankruptcy.”

Because a petitioner presents a petition to have property sold, which property is not in his possession, but is already in the possession of the court, and he only claims a security upon it by virtue of deeds which are his own property, when I have adjudged his security to fail, and that the property shall not be sold for his benefit, have I on that jurisdiction to pursue the matter further, and take from the petitioner that which he came into court with as confessedly his own, and order it to be cancelled? If I have, it can only be because the deeds remaining in the possession of this party are a cloud upon the title. When a jury at law has pronounced a deed void; the court has no power to take the deed, and deliver it to the other party to be cancelled. The jurisdiction in bankruptcy is compound; but I understand that to be over the property and rights of parties in it, when reduced to the possession of the court; but if it be necessary to adopt measures to reduce the property to possession, to remove difficulties in the way of exercising control over it, I apprehend the other jurisdictions must be resorted to; *Ex parte Coleman*, 4 Dea., 242, was cited. That case was in 1840; and when the court was asked to order the deeds to be delivered up, Sir John Cross says, "I am not prepared to say at present that the petitioner "is not within the jurisdiction of the court, in respect "of any order for the delivery up of the deeds." But he says he should like two questions to be argued: firstly whether the court had the jurisdiction to make such an order? and secondly, whether the petitioner, by the mode of stating his case, had not consented to the jurisdiction? The case does not appear to have been before the court again, and whether these questions have ever been disposed of as yet, does not appear. For the purposes of administering this estate, I do not see that the deeds are required; nor do I see that they would in any way affect the title, after having been pronounced void; and therefore if I entertained an idea that an order for cancellation of them could be upheld, yet in the uncertain state in which the point seems to be, as respects the jurisdiction, I do not think I should act wisely in making such an order at present.

It appears to me that the prayer of the cross petition ought not to be granted; and the proper order will be to say, this court doth not think proper to make any order on it. The question was not an improper one to bring before the court in the present case; and, as the point appears to me doubtful as yet, I think that the costs of all parties must be paid out of the estate.

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NOTE.—This judgment has been since confirmed, on appeal, by his Honour the Vice-Chancellor.

# THE UPPER CANADA JURIST.

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## IN THE EXECUTIVE COUNCIL.

*Before the Hon. the Chief Justice ; the Hon. J. B. Macaulay, Ex. C. the Hon.  
Attorney General Smith, Ex. C. ; and the Hon. Mr.  
Justice McLean.]*

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AUGUST 25, 26, 27, 28 AND 29, AND SEPTEMBER 2, 1846.

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ON AN APPEAL FROM THE DECISION OF HIS HONOR THE VICE-CHANCELLOR OF  
UPPER CANADA.

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*Between* WILLIAM SIMPSON, ABEL R. WARD, ELIJAH  
W. BOYCE, HENRY LAKE, RUFUS S. COLLINS,  
*and* HENRY GLASS..... *Appellants.*

AND

TERRENCE SMYTH, *and* HENRY GEORGE SMYTH, *Respondents.*

SALE OF EQUITY OF REDEMPTION BY SHERIFF UNDER FI. FA.  
—PLEADING—DEMURRER FOR WANT OF PARTIES—PRACTICE—POWER OF COURT TO REFUSE REDEMPTION UNDER CERTAIN CIRCUMSTANCES, UPON THE CONSTRUCTION OF THE 11TH CLAUSE OF THE CHANCERY ACT, 7 WILL. IV. CH. 2  
—EVIDENCE.

Held, by all the court, that an equity of redemption of an estate of inheritance *cannot* be sold by the sheriff under a common law process.

The plaintiffs in the court below having filed their bill to redeem, setting forth in a schedule the names of certain parties who had purchased portions of the mortgaged premises, and *charging them with notice* of the defect in the title, but none of whom were made parties, nor was any reason assigned for not including them as parties to the suit ; one of the defendants put in a general demurrer for want of parties, which upon argument before the Vice-Chancellor was overruled, on the ground that the prayer of the bill was in the alternative, and to the relief prayed by one of those alternatives the plaintiffs were entitled without those parties being present—Held, on appeal, that if for any part of the relief prayed other parties are necessary to be brought before the court, a demurrer to the whole bill will hold ; *but*, as the defendant had subsequently to the order overruling the demurrer put in his answer—Held, that he was too late in making an appeal from that order, and the appeal from the order overruling the demurrer was dismissed *without costs*.

*Per Robinson, C. J., and McLean, J.*—The Court of Chancery under the 11th section of the Chancery Act may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession.

*Per Macaulay, and Smith, Ex. C's.*—That the court has not, under this section, power to refuse redemption, where by the law of England the party would be entitled to redeem, but has only a discretion of imposing terms different from those that would be imposed according to the strict rules in England. One of several defendants having deposed to a fact, which, if proved by proper testimony would have tended to defeat the suit as against him as well as against his co-defendants—*Quære*, whether his evidence is admissable on behalf of his co-defendant? (a)

By the pleadings in this cause, it appeared that in November, 1840, the respondents filed their original bill against William Simpson, stating to the effect, that their father, Thomas Smyth deceased, was seized in fee of lots Nos. 1 & 2 in the 4th concession of Elmsley, and that in December, 1810, he had mortgaged the premises to one Joseph Sewall for £233 11s. 3d., payable 3rd August, 1811, which was not paid at the time limited; that Thomas Smyth in December, 1839 duly made his will, and devised the premises to the respondents, subject to a life interest of his widow which had since determined, and that Thomas Smyth died without revoking said will; the bill further stated that the interest of Sewall had become vested in William Simpson, to whom applications had been made to redeem, and prayed an account, &c.

To this bill Simpson filed a plea setting forth that Sewall by a deed poll assigned the premises to Charles Jones, in 1825; That Sewall in Trinity Term, 59 Geo. III, recovered judgment against Thomas Smyth for £467 2s. 6d. debt, and £13 13s., costs, and sued out a writ against goods, which was returned *nulla bona*, and subsequently sued out *fi. fa.* against lands directed to the sheriff of the Johnston District, under which the sheriff in 1825 exposed the interest of Thomas Smyth in the premises, for sale, and that the said Jones then bought the same for £105, and by deed poll dated 27th

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(a) Abel R. Ward had been examined as a witness for the defendants in the court below, and stated that previous to the transfer from Charles Jones to himself, Hicock had asked Terence Smyth in presence of Ward, "if his father had any intention to repurchase, and Terence Smyth said his father had no such intention; that he had removed the irons from the old saw-mill, and had abandoned the place; and that he (Terence Smith) was very glad it was going to fall into my hands."

This evidence had been objected to in the court below, and was read *de bene esse*.

The objection, on the part of the respondents, was again made on the appeal. The court appeared to sustain the objection, and directed it to be read *de bene esse*, but no notice was taken of it in the judgments.



August, 1825, the sheriff conveyed to Jones all Thomas Smyth's interest; that Jones by deed poll of 30th July, 1827, for £600 conveyed to Trueman Hicock and James Simpson as tenants in common, the former two thirds, the latter one third; that Hicock conveyed to James Simpson, two undivided sixths of the premises by two several conveyances of 31st January, and 11th April, 1831; that Hicock on the 2nd day of May, 1831, conveyed to Abel R. Ward his remaining one third part of the premises (*a*); that James Simpson, and Ward, on 31st February, 1832, conveyed the premises in question to William Simpson for £5000, and submitted that the respondents had not any title to the premises or right to redeem.

On the 30th July, 1841, this plea was argued before the Vice-Chancellor, and over-ruled with costs. Subsequently, and in the month of April, 1842, William Simpson put in his answer, and thereby, after admitting the seizin in fee of Thomas Smyth, the mortgage to Sewall, and the death and will of Thomas Smyth as stated in the bill; the answer set forth the judgment obtained by Sewall against Smyth, the writ of *fi. fa.* against lands, and the sale thereunder of the premises in question to Jones, as in the plea mentioned; and relied upon the sheriff's deed as a good conveyance of the mortgagor's equity of redemption; also, that Thomas Smyth had relinquished the possession of the premises in question, at the time of such sale, without any steps having been taken to eject him therefrom, and having also withdrawn, not only his personal property, but also the fixtures of the saw-mill then erected thereon; and that the price paid upon that sale was the then full value of the property.

The answer next deduced the title from Charles Jones to William Simpson, exactly as in the plea, and stated beside, an indenture of the fifth day of June, 1834, between William Simpson and Abel R. Ward, by which a partition was made of the property in question, and the two-thirds of Simpson, as well as the one third of Ward, were described by metes and bounds. Simpson having stated in his answer the various conveyances set forth in the plea, relied not only upon the

(*a*) By Ward's answer it appeared that Hicock only held as trustee for Ward.

legal effect of those deeds, but also upon the constructive assent of Thomas Smyth, as well as of the respondents, to such sales. The answer stated that subsequently to the sheriff's sale, Charles Jones was willing that Thomas Smyth should redeem the property, which was communicated to Thomas Smyth and the respondents, who for a considerable period, endeavoured to raise the funds necessary to redeem, and had also offered the property for sale to various persons, and that Jones had refused to sell to any person else, until an offer had been made to Smyth to redeem (*a*). That after the terms of the sale to Abel R. Ward had been settled, Truman Hicock, whom he had requested to become his security for the purchase money, declined (Simpson had been informed) to do so, unless assured that Thomas Smyth had relinquished all hope of purchasing, and only assented upon the assurance of Terence Smyth, one of the respondents, that his father, the said Thomas Smyth, was unable to redeem or sell, and assented to the sale to Ward. The answer further stated, that Ward had taken possession of the property in question upon his purchase from Jones, and that it had continued in his possession, or that of his assigns, up to the time of filing the bill. That during all this period, the respondents had resided in the vicinity of the property in question, as had Thomas Smyth until his death; and that they had seen the extensive and costly improvements made by Simpson, without remonstrance. That Terence Smyth, in 1832, wrote to one Shaw, then about to purchase a portion of the property, that in his, Terence Smyth's opinion, Shaw or any person else, might purchase without fear of being disturbed by his father (*b*). Under the circumstances Simpson relied on the 11th clause of the 7th Will. IV., c. 2. The answer

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(*a*) By the evidence it was shown that Jones had given Thomas Smyth one month to pay the amount, and that at or soon after the expiration thereof, the sale to Ward was completed.

(*b*) The letter here referred to was in the following words :

Merrickville, 10th May, 1832.

"Dear Sir,—Yours of the 8th instant is duly received, and in reply, beg to observe that Simpson's title to Smyth's Falls, depends upon the legality of the sheriff's deed, together with my father's right of redemption, agreeable to the laws of England with regard to mortgages; but my opinion is, that you or any other person may purchase without any fear of being disturbed by my father,—I remain," &c.

"T. SMYTH."

disclosed that a considerable portion of the property in question had been set apart by the proper authority, for the use of the Rideau Canal; and a schedule annexed, contained the names of all the persons to whom William Simpson had sold any portions of the premises as village lots, and the answer submitted that her Majesty's attorney general, and the various sub-purchasers, ought to have been parties; thereupon the respondents, in the month of December, 1842, amended their bill by (amongst other things) making the appellants Ward, Boyce, Lake, Collins, and Glass, parties defendants thereto. And in such amended bill, after stating the various conveyances set forth in the answer to the original bill and the deed of partition, they stated that subsequently to the execution of the deed of partition, the appellant Simpson had conveyed various portions of the property sought to be redeemed, to certain persons whose names were set out in a schedule to the said bill annexed. And that Abel R. Ward had also made various sales, but that they were unable to discover the names of such purchasers; and the bill also charged notice to each of the sub-purchasers of the claim set up by the respondents, and prayed "that defendants might answer and that an account might be taken of, what remained due for principal and interest on the said mortgage, and of the rents and profits of the said mortgaged premises, received by defendants and others, the purchasers of any of the said village lots so conveyed as aforesaid, or any other person or persons by their order or for their use, or which without their wilful default or neglect might have been received; and that upon payment of what, (if any thing), should appear to be due for principal and interest on the said mortgage, after deducting the said rents and profits, plaintiffs might be admitted to redeem the said premises, and that the same might be reconveyed to plaintiffs and their heirs, and that any surplus of the said rents and profits above what should appear to be due for principal and interest, on the said mortgage, might be repaid to plaintiffs; or that an account might be taken of the rents and profits of the said mortgaged premises received by defendants, or any other persons or person, by their order or for their use, or which, without their wilful default, might have been re-

“ ceived ; and that upon payment of a proportionate part of  
“ what, (if any thing), should appear to be due for principal  
“ and interest, on the said mortgage, after deducting the said  
“ rents and profits, plaintiffs might be admitted to redeem so  
“ much of the said mortgaged premises as defendants are  
“ interested in, and that the same might be reconveyed to  
“ plaintiffs, and that any surplus of the said rents and profits  
“ above the said proportionate part, might be repaid to plain-  
“ tiffs without prejudice to their proceeding against the other  
“ purchasers of the said village lots, for the redemption of  
“ the same ; or, that upon payment of what (if any thing)  
“ should appear to be due for principal and interest on the  
“ said mortgage, after deducting the said last mentioned rents  
“ and profits, plaintiffs be admitted to redeem the said parts  
“ of the said mortgaged premises wherein defendants are in-  
“ terested, and that the same might be reconveyed to plain-  
“ tiffs ; and that any surplus of the same rents and profits  
“ above what should appear to be due for principal and  
“ interest on the said mortgage might be repaid to plaintiffs,  
“ and that the said W. Simpson and A. R. Ward might pay  
“ to plaintiffs the value of the residue of the said mortgaged  
“ premises, and a compensation for the rents and profits  
“ thereof, not accounted for, or the purchase moneys or money  
“ received in respect thereof, with interest from the times or  
“ time of receiving the same, at the option of plaintiffs ; or,  
“ that upon payment to the said William Simpson and A. R.  
“ Ward of what (if any thing) should appear to be due for  
“ principal and interest on the said mortgage, after deducting  
“ the rents and profits of the said mortgaged premises, re-  
“ ceived by the said William Simpson, and Abel R. Ward, or  
“ any other persons or person, by their order or for their use,  
“ or which without their wilful default might have been  
“ received, plaintiffs might be admitted to redeem such parts  
“ of the said mortgaged premises as the said William Simp-  
“ son and Abel R. Ward continue interested in, and that the  
“ same might be reconveyed to plaintiffs, and that any sur-  
“ plus of the said last mentioned rents and profits, above  
“ what should appear to be due for principal and interest on  
“ the said mortgage, might be repaid to plaintiffs by the said



“Simpson and Abel R. Ward; and that the said William Simpson and Abel R. Ward might pay to the plaintiffs the value of the residue of the said mortgaged premises, and a compensation for the rent and profits thereof, not accounted for, or the purchase moneys or money, received in respect thereof, with interest from the times or time of receiving the same, at the option of plaintiffs, and for further relief.”

To the bill so amended the appellant William Simpson, in the month of March, 1843, put in a general demurrer for want of parties, alleging as cause of demurrer that the several sub-purchasers named in the schedule to the amended bill were necessary parties; which demurrer the Vice-Chancellor on the 11th July, 1843, overruled. After the demurrer of William Simpson had been overruled, the appellants Simpson, Ward and Glass put in their several answers, and Lake, Boyce and Collins answered jointly, in which they respectively set up the defences relied upon in the plea and demurrer of Simpson, as also the equitable grounds relied upon in Simpson's answer to the original bill.

Evidence was taken, the important parts of which are noticed in the judgment of the court.

[The seizin of Thomas Smyth, the mortgage to Sewall, the sheriff's sale in 1825 and intermediate conveyances, the possession of Ward and those claiming under him, from the sale by Jones to him in 1826, as also the extensive improvements made upon the premises, were either admitted or clearly proved.]

The cause came on to be heard on the 4th June, 1845, when his Honor the Vice-Chancellor made the following decree:

“His Honor doth order and decree, that it be referred to the master of this court to take an account of what is due to the plaintiffs on the mortgage security in the pleadings mentioned, and to compute interest thereupon; and it is further ordered, that it be referred to the master to take an account of the present value of the improvements made by the defendants on such of the mortgaged lands as are in their possession, or as are claimed by the said defendants and it is ordered, that it be referred to the master to set an occupation ground-rent on such of the mortgaged lands as

“are claimed by the said defendants during such time as the  
“same have been beneficially occupied by them, or their  
“tenants, since the execution of the said mortgage, and to  
“calculate the amount thereof, and an occupation ground-rent  
“on such of the said mortgaged lands as have been sold during  
“such time as the same were beneficially occupied by the de-  
“fendants or their tenants after the creation of the mortgage  
“and before the sale thereof, and to calculate the amount  
“thereof; and it is further ordered, that it be referred to the  
“master to take an account of such of the mortgaged lands as  
“have been sold, and of the terms on which the same were  
“sold, and of the moneys received by the defendants or any of  
“them, or by any person or persons by their order or for their  
“use, on account of such sales, and to calculate interest there-  
“on; and his honor doth order and decree, that the mortgage-  
“money and interest, and the aforesaid value of the improve-  
“ments be set against the amount of the said ground-rent, and  
“of the said purchase moneys received by the said defend-  
“ants and the interest thereof, and that a balance be struck,  
“and that the party from whom such balance shall appear  
“to be due, do pay the same to the other party; and in case  
“such balance shall appear to be due from the said plaintiffs  
“to the said defendants, then upon payment thereof, It is or-  
“dered, that the said defendants do convey and assure such  
“of the mortgaged lands as are vested in them unto the plain-  
“tiffs, or as they shall appoint; and in case such balance shall  
“appear to be due from the defendants to the said plaintiffs,  
“then that the said defendants do pay the same, and con-  
“vey and assure such of the mortgaged lands as are vested  
“in them unto the plaintiffs, or as they shall appoint; and  
“his honor doth further order, that the said defendants do as-  
“sign to the plaintiffs any contracts which they have made  
“for the sale of any of the mortgaged lands, and which may  
“remain in any respect open and unperformed; and it is fur-  
“ther ordered, that such mortgage-money and interest afore-  
“said be divided amongst the said defendants rateably and  
“in proportion, and that every defendant receive the value  
“of his own improvements, and (a) such ground-rent as

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(a) A clerical error appears to have been committed here; it should read  
“after deducting,” instead of “and.”

“aforesaid, in respect of the lands occupied as aforesaid by  
 “himself or his tenants, and such part of the aforesaid pur-  
 “chase moneys as he has received, with interest thereon;  
 “and in taking the accounts hereby referred to the master,  
 “he is to make to the parties all just allowances; and for the  
 “better taking of the same, the parties are to produce before  
 “and leave with the master upon oath all deeds, books, papers  
 “and writings in their custody or power relating thereto,  
 “and may be examined upon interrogatories as the master  
 “shall direct; for which purpose and for the examination of  
 “witnesses in the taking of the said accounts, if necessary, a  
 “commission or commissions may issue into the country,  
 “directed to proper commissioners; or such examination may  
 “be had before an examiner or examiners of this court in the  
 “country, as the master shall direct; and his honor doth re-  
 “serve the consideration of costs, and of further directions,  
 “until after the master shall have made his report.”

From this decree and the several orders overruling the plea and demurrer of William Simpson, the defendants (in the court below) now appealed; and, on the appeal coming on for argument,

*Sherwood, Q.C., Sullivan and Blake*, appeared as counsel for the appellants Simpson and Ward.—And with reference to the order overruling the plea, stated briefly the possession of Thomas Smyth, the father of the respondents, the mortgage and bond to Mr. Sewall, and subsequent judgment and execution against lands, under which the sheriff had *seized the lands* now sought to be redeemed, and sold to Jones. Jones *claiming the fee*, sells, and after various mesne assignments, the estate vests in the appellants. The Smyths having filed their bill to redeem, Simpson pleaded these matters in bar; and the question that arises is, could the sheriff sell Smyth's *equity of redemption* under a writ of fieri facias issued against *lands*? and secondly, if the equity of redemption were saleable under that writ, has the sale of the *land* conveyed it?

First, Is the equity of redemption saleable under this writ? If it be not, it must be on the ground either (first), that equitable interests cannot be sold under a common law process,

or (secondly), that the words of the statute (5 Geo. II. ch. 7,) are not comprehensive enough to embrace such estates.

Now as to equitable interests not being saleable under common law process. At common law, two writs only were known for the recovery of debts ; the *fiery facias*, against goods, and the *levary facias*, against corn growing, &c. (a). The only remedies against lands known at the present day, we owe to express enactments ; and the first statute which subjected lands to *judgment*, is that of Westminster, 2nd. (b), which allows the plaintiff to have either a writ of *fiery facias* directed to the sheriff, “ or that the sheriff shall deliver to him all the “ chattels of the debtor (saving only his oxen and beasts of “ his plough, *and the one-half of his lands*, until the debt “ be levied upon a reasonable price or extent ;” but it is observable in the first place, that *land* is the only word used in the Statute of Westminster, “ *Mediatatem Terræ*,” and therefore no argument can be fairly deducible from the construction of that statute ; and secondly, that uses and trusts were unknown at the time the Statute of Westminster was passed, and but little understood at the date of the Statute of Treasons ; for if uses had been then known, it is evident that the clergy would have taken advantage of them in their memorable struggles for aggrandizement, but we find that the Statute “ *De Religioses* ” takes no notice of them, though passed to prevent alienations in mortmain, and indeed although uses were in all probability devised by the clergy in order to defeat the Statute *De Religioses* : still they did not become of frequent occurrence till the contest between the houses of York and Lancaster, in the reign of Richard II., obliged men to devise some mode to prevent the frequent forfeitures that were then made ; and hence Lord Bacon assigns that reign as the period of the introduction of uses (c). Therefore it is evident that neither the Statute of Westminster, which was passed before uses were known, nor the Statute of Treasons, which was enacted before they became a common mode of conveyance, could be construed to include anything save *land at common law*. But when conveyances to uses became of more common occurrence,

(a) Sir Wm. Harbut's case, 3 Co. II, b. 12 a.

(b) 13 Ed. I C. 18.

(c) Bac. Uses, p. 24.



although mere creatures of equity, (for we know that John Waltham, Chancellor to Richard II., devised the subpoena returnable *in Chancery only*) still we find some general and many special acts of parliament in this reign enacting forfeiture of lands held to uses (a); and subsequently, the statutes 1 R. III., and 19 H. VII., c. 15, make lands liable to execution issued against the *cestuique use*; therefore the doctrine, that equitable interests cannot be made the subject of sale under a common law process, is not founded in law; for although the Statute of Westminster, 2nd, which relaxed the common law in favour of creditors, and gave a remedy against land did not extend to uses, still uses were then unknown: and when known, we find the legislature subjecting them to *common law process*. But when the statute of Henry VIII. abolished uses, and trusts sprang into existence, (the mere creatures of, and cognizable only in courts of equity), do we find the legislature regarding the sale of equitable interests by common law process as incompatible? On the contrary, the statute of frauds was passed for the express purpose of subjecting those equitable interests to this process. Now, when we examine the words of this statute, we find several points worthy of observation; and first, we find nothing in the statute having any reference to chattel interests in land; the word "land" is said, by Shepherd, in his Touchstone (p. 92), to mean "frank tenement" at least; and further, at page 88, and Cro. Car. 293, where "he having freehold and interest "for years, devises *all his lands*," freehold only will pass, and the words "tenements and hereditaments" in that connection cannot refer to a term of years. And when we examine the statute with a view to determine what remedy it affords in case of trusts of *the fee*, we submit that the words are amply sufficient to include *all* manner of equitable interest; the language of the statute is, "*In any manner of wise seized or "possessed of*;" which will of course embrace an equity of redemption. But when we remember that the legislature was not devising a new mode of execution, to be applied to a new species of property, then for the first time rendered liable

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(a) 21 R. 2 C. 3.

to the claims of creditors, but was applying to such new species of property the different writs of execution already in use we shall find in the subsequent words enough to qualify the general expression ; for the sheriff is only authorized to make such execution when the trustee is “ *seized or possessed in trust for him against whom execution is so sued.*”

Now when we consider the nature of the *writ of elegit*, as connected with these words, it will be seen that the legislature can only have intended to include cases of simple trust, because where the trusts are in favour of some other person as well as the person against whom execution issued, upon what principle of law or justice could the legislature permit the sheriff to deliver a moiety of such trust lands, disregarding the interest of the other cestuique trust; or what consistency would there be in delivering possession of land to-day, which might be recovered by the other cestuique trust to-morrow. And that this is the true reason that the equity of redemption on a mortgage in fee, was not and indeed could not have been intended by the legislature to have been included in the 10th section of the Statute of Frauds, seems almost demonstrated by the recent English statute 1 & 2 Victoria ch. 110; the words of which are incorporated in the writs devised by the court under the act (a), and are certainly wide enough to comprehend the equity of redemption. Yet it is not included in the 11th section, because the writ of *elegit*, directing the debt to be made from the profits, not from the sale of the land, is inapplicable to that sort of interest; and therefore the 13th section makes provision that the judgment shall be a charge upon the equity of redemption (b). Now when we seek to test these conclusions by the decisions which have been come to on the statute, we shall find the first position borne out by *sundry decisions*, although it is respectfully submitted that the grounds upon which those decisions have been placed, cannot be considered as the true ground upon which they ought to rest. And upon the second point, although we find no direct decision to warrant that conclusion, still we are not without ample authority from the text writers to confirm our

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(a) 5 Bing. N. C. 366.

(b) 2 Sug. 398. 10th ed.

judgment; but here, too, we find those statements founded on vague general views of the subject, and not upon those clear principles of reason which, in a matter of such vital practical importance, one would be warranted in expecting. *Lyster v. Dolland*, (1 Ves. Jun. 430), *Scott v. Scholey et al.*, (8 East. 467), are the cases relied upon by the other side, but both cases seem to be decided upon grounds peculiar to *trusts of chattels*; and in neither was the decision rested upon this,—that equitable interests could not be sold under common law process. Then as to the text writers on the second point, namely, the power of the sheriff, under a writ of *fi. fa.*, to sell the equity of redemption upon a mortgage in fee (*a*), while they deny the existence of such a power, do yet, as is humbly submitted, rest such denial upon most unsatisfactory grounds. But Saunders, on Uses and Trusts (*b*), seems to place the matter on the proper footing. And the view contended for by the appellants seems to be fully borne out and elucidated by the judgment in *Doe d. Hull v. Greenhill*, 4 B. & A. 687. Thus we are led to conclude that an equity of redemption on a mortgage in fee cannot be extended under the statute of frauds, but we do so not on vague and uncertain grounds, but on sound principles of reasoning; not on the general assertion that the statute is not comprehensive enough to include such interests, because no doubt under the word *hereditament* such interest will pass (*c*); but on the ground that, although the words are sufficient to comprehend it, yet from the very nature of the interest, and of the writ of *elegit*, it cannot have been the intention of the legislature to subject it to extent; and this view will fully explain the language of the Vice Chancellor in *Forth v. Duke of Norfolk* (*d*), cited by Mr. Powell in support of his argument. Now if the end proposed by the 5 Geo. II., be the one aimed at by the 29 C. II.; and if the means of attaining that end be the same in each, it is admitted that the reasons already adduced will go far to shew, that the equity of redemption cannot be sold under the pro-

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(*a*) 2 Sug. V. & P. 393, 10th ed. ; 1 Sug. V. & P. 541, 9th ed. ; Powell, on Mortgages, 254 *a*, 256 *a*.

(*b*) 4th ed. vol. i, page 275.

(*c*) 1 Powell on Mort. 252 and notes.

(*d*) 4 Mod. 504.

visions of the former. But if the end proposed in each be different : if the means pointed out for the attainment of that end be materially different, and if the language of those acts be remarkably dissimilar, then it is submitted that those arguments which prove that the equity of redemption cannot be extended under the statutes of frauds, cannot with any shadow of justice be applied to the 5th Geo. II. The preamble to this act sets forth that "His Majesty's subjects "trading to the British plantations in America, had lain "under great difficulties for want of more easy methods "of proving, recovering and levying debts due to them than "were then used in some of the said plantations ; and, that it "would tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain, to the "natives and inhabitants of the said plantations, and to the "advancing of the trade of the kingdom thither, if such inconveniences were remedied." And the enacting clauses shew that the object of this statute was, first, to make a species of property theretofore not liable to sale, subject to be sold for the satisfaction of *simple contract* debts ; which was altogether different from the end proposed by the 29th C. II. ; and secondly, such end is attained, not as in that act, by means of the writs of execution before then in use, but by subjecting them to sale under *fi. fa.*, by which they could not before have been affected. Now let us first enquire if trust estates of any description are rendered liable under 5th Geo. II., and that trust estates are included is too plain for argument. Consider the object of the statute. If trust estates are not included under 5 Geo. II., then even the remedies furnished by 29th C. II. are abridged ; but such a notion is most effectually exploded by the reasoning in *Gardiner v. Gardiner* (a) If, then, trust estates are rendered saleable under 5 Geo. II., and it seems impossible to contend against that, by what rule of construction it may be asked shall an equity of redemption be excluded ? The words of the act include it. It falls in with the object and intentions of the legislature ; it is in no respect a violation of any principle of law ; and the words of the act are, "the houses, lands, negroes

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(a) 2nd & 3rd Victoria.



“and other hereditaments, *belonging to any person indebted*,” it does not speak of a person being *seized in trust for the person indebted*, as in the statute of frauds, by which words an equity of redemption is excluded. And lastly, the king and the subject are placed on the same footing by the statute of Geo. II. Now equitable interests and equities of redemption, were always held to be saleable under an extent at the suit of the crown (a). And the decisions which have been come to on the annuity act, would seem to furnish a strong analogy for holding that the legislature is not to be held as excluding, but rather as including equitable interests (b). The language, too, of the 25th Geo. III. ch. 35, is very strong; the object of that act is to render the lands of debtors to the crown saleable. The words are, “The right, title and interest of any debtor “in any *lands, tenements, and hereditaments*, may be sold.” And these have been held to embrace an equity of redemption (c). But it may be argued that this construction will, *by implication*, make an important alteration in the law as it existed prior to the 5th Geo. II., converting that into legal assets, which was before equitable without express words to that effect. It is unnecessary to pause to point out the difference between rendering property liable in the lifetime of the debtor, and constituting it assets after his decease; because it is admitted that all which is rendered liable in his lifetime, is made assets after his decease; but it may be answered that the mutations on this subject in England have been at the least to the full as extensive, without affording ground for any such argument as that urged against the construction contended for. Trust estates were not formerly assets at all; and we do not find the statute of frauds making them *equitable assets* (although the trusts were not recognized at all at common law), but *legal assets*.

Real estate was not at common law assets, in any wise, to satisfy simple contract debts; but we find that lands, by the statute 3 and 4 Will. IV. ch. 104, are made assets, and singular enough, not *legal*, but *equitable*; an equity of redemption was equitable assets; but the 1 and 2 Vic. ch. 110,

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(a) The King v. Delamott, Forrest, 163; 3 Pres. Abst, 353.

(b) Tucker v. Thurston, 17 Ves. 130.

(c) 1 Saund. Uses, 277.

s. 13, charges it with a legal judgment, and gives the remedy. And surely an alteration by which an equity of redemption would be rendered saleable under a *fi. fa.*, cannot be regarded as more vital than the changes confessedly made by the act now under consideration; by it, lands, which were only real assets to be reached *through the heir*, and only for the satisfaction of real securities, are made assets, *legal* assets in the hands of an executor, and that too, without providing for the priority of real securities.

These considerations, supported as they are by English authorities, would seem, it is submitted, to furnish strong grounds for the opinion, that lands are not only assets to be reached through a judgment against the executors, but that they are assets in their hands, and as such are under their control, and saleable by them; such at least would seem to be the result of *Thompson v. Grant* (a).

As to the order over-ruling the demurrer.—The bill having been filed by those entitled to the equity of redemption against some of those entitled to the legal estate, without any reason being assigned on the face of the record for this proceeding, *a demurrer was put in for want of parties*. In support of this demurrer it was argued, that a mortgagee, inasmuch as he becomes the absolute owner at law, is, upon default made, entitled to encumber his estate as he may find convenient; and that the mortgagor, when he comes into equity to redeem, must not only bring all such encumbrancers before the court, but must bring them at his own expense, because all happened through his default. (b). As the general rule, therefore, the application to redeem must be made *by the person entitled to the equity of redemption, and against all those entitled to the mortgage money, and those in whom the legal estate has vested*. And conversely, the bill to foreclose must be filed by those entitled *to the whole mortgage money, against the persons entitled to the entire equity* (c). That such is the general rule, and that this bill departs from such rule, it was assumed would

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(a) 1 Russ. 540.

(b) *Wetherell v. Collins*, 3 Madd. 235; *Yates v. Hambly*, 2 Atk. 238.

(c) *Palmer v. Earl Carlisle*, 1 S. & S., 425; *Osborne v. Fallows*, 1 R. & M., 741.

not be denied, but it was surmised that an attempt would be made to support the pleadings upon the principle of the recent decisions before Lord Cottenham (*a*). Assuming the principle of Lord Cottenham's decision to apply at all (which was denied), it was observed that the bill is *prima facie* demurrable; it is founded on one contract, and yet leaves the rights of several persons interested thereunder undetermined. It is therefore a bill which, without any reason assigned, splits up suits; and instead of concluding the entire matter in one proceeding, it affects only such parts of that general object as suited the whim of the respondents, and that without any reason assigned on the record. This is a good ground of demurrer (*b*). Now, it cannot be contended, that the decisions relied upon establish that any particular number of parties is so great, as of itself to warrant the court in saying, that the established rule for avoiding multiplicity of suits is to be disregarded. In *Harrison v. Stewardson* (*c*), there were twenty creditors held to be necessary; and in *Holland v. Baker* (*d*) fifty-four creditors had been made parties. If therefore no definite number has been fixed upon, as in itself so great as to warrant, without more, the disregard of the established rules, the result is, that the necessity of making all persons interested, parties, or the propriety of omitting them, is in all cases a question of expediency, depending on the circumstances; and consequently, each bill must contain such reasons or grounds, as will induce the court to depart from its rule, and dispense with the absent persons (*e*). But in truth, the decisions before Lord Cottenham do not apply; they are all based upon the doctrine of representation, which has not and cannot have any application here. You cannot, on the doctrine of representation, take an account or distribute a fund, in the absence of any party interested (*f*).

But it is contended, that some relief may be granted, in the absence of the parties having the legal interest in portions of the mortgaged estate, who have not been brought before the court, and consequently the *general* demurrer must be over-

(*a*) 1 M. & C., 559, and 4 M. & C., 619

(*b*) 1 Ver. 29: Mitf. 183.

(*c*) 2 Hare, 231.

(*d*) 3 Hare, 68.

. *Holland v. Baker*, 3 Hare, 68.

*r*) *Evans v. Stokes*, 1 Keen, 24; *Hawkins v. Hawkins*, 1 Hare, 543.

ruled. It is, however, obvious, that such argument, if sound in itself, does not meet the objection, for by the bill in question, an attempt is made to divide into several suits that which ought properly to be determined by one. Now, it is submitted, such a state of things can never be permitted, without some reason for it being stated on the record. But the argument stated is not valid, for a demurrer for want of parties is always general, and consequently must prevail, though some part of the prayer might properly be granted on the hearing. The rule in equity is, that the defendant may always demur *ore tenus*, *provided such demurrer is coextensive with that upon the record*. Now, a defendant who demurs generally upon the record for want of equity, is always permitted to demur *ore tenus* for want of parties. The conclusion is inevitable, that a demurrer for want of parties is to the whole bill (*a*). The matter however is no longer depending on general reasoning; there is a recent decision directly in point (*b*). Therefore some part of the prayer, being confessedly wrong, and such as could not be granted in the absence of several persons who had not been made parties, the bill was clearly liable to general demurrer, and the order over-ruling it must be reversed on this appeal.

*Hagarty*, for the other appellants.

*Harrison*, Q.C., and *Esten*, for the respondents.—As to the order overruling the plea, the act of the 5th Geo. II. contemplates two objects: first, to facilitate the proof; second, the recovery of debts.

The only means taken for the latter purpose are, first, to make lands assets for the payment of simple contract debts; second, to subject them to the same process as personal estate. Personal estate is left entirely as it was. The inquiry then always is in any given case, What is your remedy against personal estate? for whatever it be, the same remedy you have against lands. Now the remedies against personal estate are various, according to the nature of the interest and the circumstances of the case: if your interest in personal estate be legal, you sell it under the *fi. fa.*; if equitable, you proceed by bill in equity; and if your estate be an equity of

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(*a*) *Pyle v. Price*, 6 Ves. 780. (*b*) *Lidbetter v. Long*, 4 M. & C., 286.



redemption, you may either apply to redeem, or pray a sale subject to the mortgage. The remedies against personal estate therefore being various, according to the circumstances, you must always, in determining what remedies you have against lands, take the circumstances of the case into consideration; for if you apply to lands one sort of remedy or process, under circumstances which would make it necessary to resort to another with respect to personal estate, you do not observe the 5th Geo. II., but you depart from it.

If personal property be mortgaged, and the condition broken, the interest or equity of redemption of the mortgagor is not saleable under legal execution; the remedy of the creditor is by bill in equity, either for a redemption of the mortgaged property, or for a sale subject to the mortgage: *Scott v. Scholey* (a), in which case the security comprised both a term for years and moveables. Now lands of inheritance mortgaged, after breach of the condition, are in precisely the same situation as personal property so circumstanced. You must apply the same remedy to both. We have already seen what that is; it is not a sale under a *fi. fa.*

It may be said that this is a circuitous remedy; the answer is, that the legislature was content to place lands on the same footing as personal estate; it did not mean to give a better remedy against lands than against goods. It may also be said, that if this construction prevail, the statute does not vary the remedy against an equity of redemption in lands of inheritance, for before the statute it was the same as against a similar interest in goods. This is true, but it surely cannot be argued, that because the statute, where it finds the remedies different, makes them the same, where it finds them the same it makes them different.

It is also said, that a mortgagee of chattels may sell after notice to the mortgagor; this may be true; and in this case he is in the same situation as a mortgagee of lands with a power of sale, which does not vary the nature of the equity of redemption; the question is not whether the mortgagee can sell, but whether the sheriff can sell; he sells the interest

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(a) 8 East. 466.

of the mortgagor, which is not altered by the existence of a power of sale in the mortgagee; it is not pretended, that a mortgagee of a term for years without a power of sale, can sell after notice to the mortgagor.

An equity of redemption of a term, is confessedly not made saleable or subject to legal process by the act; of which the principle is to assimilate lands to personalty. Now it would be absurd to say, that an equity of redemption of lands of inheritance more resembled personalty than that which is personalty already, namely an equity of redemption of a term. It is true that the Statute of Frauds subjects trusts of inheritance, and not trusts of terms, to legal process, of which the reason is not very obvious; but the same absurdity does not arise, because it was not the object of the Statute of Frauds to make real estate personal estate, but to make equitable estates legal estates.

It is then contended that the Statute of Frauds is to draw the line between what is subject to legal and what is subject to equitable process; and as it opens the door to some equitable estates, so it admits the whole. We may admit the premises for the sake of argument, but we deny the inference. We are willing upon this question, for the sake of the argument, to take the Statute of Frauds as a guide, and to admit that trusts of inheritance are saleable under a *fi. fa.*; but this will not warrant the sale of equities of redemption, either of goods or lands, under the same process; these interests being wholly untouched by the statute. In fact all the legislative provisions, and they are many, which have had for their object the assimilation of equitable to legal estates, have cautiously excepted from their operation equities of redemption, in consequence of the immense inconvenience which would arise from a contrary disposition. In this particular case, for instance, on a sale of an equity of redemption, the mortgage money would be part of the purchase money, which it would be the duty of the sheriff to see paid before he gave a deed; for which purpose he must determine how much is due; a duty which would render it necessary for him to decide some of the most nice and difficult questions of law and practice which engage the attention of courts of equity.

Upon all these grounds it is submitted, that the sheriff's sale in the present case did not divest the interest of Thomas Smyth, but that it remained in him notwithstanding such sale, and devolved under his will to the respondents, who have therefore the right of redemption in the present case, if it exist in any body.

As to the order overruling the demurrer : The demurrer complains that the persons named in the schedule to the bill other than the parties to the suit, being also purchasers of village lots, are not before the court; and in fact asserts this proposition, that the mortgagee may divide the lands amongst an infinite number of persons, and thereby make redemption impracticable, and deprive the mortgagor of his property. Now, to waive all other points, as being attended with some degree of doubt, and to confine our attention to what is clear, the respondents must be entitled to redeem the portions of the parties before the court, claiming compensation from the vendors of the residue for its alienation. The purchasers selected cannot complain of being selected for this purpose ; they suffer no more than they would if all the parties were before the court. No objection can be made to the abstract right of the respondents to this mode of relief. A mortgagee alienating part of the mortgaged property, receiving its value, and giving no notice of the mortgage to the purchaser, cannot by this wrongful act escape the liabilities of a mortgagee ; and a course which would be indisputably right in one case, may be voluntarily adopted in another at the call of circumstances different in their nature, but not less imperative. At all events the vendors must be liable to the redemption of the property retained, and to make compensation for the property sold, the respondents waiving all relief against the purchasers, and confirming their titles. To two of the four alternatives (every one of which supersedes all others) prayed by the bill, the respondents are therefore clearly entitled ; and as the demurrer is general to the whole bill, and asserts that they are entitled to no part of the relief thereby prayed, it must be overruled.—*Palmer v. Ld. Carlisle*, 1 S. & S. 423 ; *Lowe v. Morgan*, 1 Br. C. C. 368, *Butler's note* ; *Smith v. Snow*, 3 Madd. 10 ; *Wetherell v.*

Collins, 3 Madd. 250; Yates v. Hambly, 2 Atk. 238; Daniel, Ch. Pr. 1, 365-7, 357-8; Osborne v. Fallowes, 1 R. & M. 741; Meux v. Maltby, 2 Swan, 277; Anon, 2 Eq. Ca. Ab. 166 Pl. 7; Calverly v. Phelps, 6 Madd. 229; Story, Eq. Pl. p. 174; Hutchinson v. Townsend, 2 Keen. 675; Walworth v. Holt, 4 My. & Cr. 685; Mair v. Malachy, 1 My. & C. 559; Clause 36 of Act of 1834.

The right to appeal from the order on the demurrer is waived by answering, entering into evidence, and proceeding to a hearing; after which the demurrer could not be allowed, as that would put the party who had so acted out of court.

[The arguments of counsel as to the merits and the power of the court to refuse redemption, are sufficiently set forth in the judgments delivered.]

ROBINSON, C. J.—The respondents, as devisees of their father Thomas Smyth, filed their bill to redeem 400 acres of land in the township of Elmsley, being lots 1 and 2 in the 4th concession, which their father had mortgaged on the 8th of December, 1810, to one Sewall, to secure a debt of £233 11s. 3d., payable on 3rd of August, 1811, with interest. They filed their bill on the 25th November, 1840, setting forth, as usual, that the money not being paid the estate had become absolute at law in Sewall, and had by divers conveyances become vested in William Simpson the defendant.

On the 22nd of April, 1841, the defendant pleaded to this bill, that Sewall the mortgagee had, by deed made on the 8th August, 1825, assigned all his right in the premises to Chas. Jones, to hold in fee; that in Trinity Term, 59 Geo. III., Sewall recovered judgment in the King's Bench in Upper Canada against Thomas Smyth, the mortgagor mentioned in the bill, for £467 2s. 6d. debt, and £13 13s. costs; and that, upon a writ of *fi. fa.*, taken out in the 5th year of Geo. IV. upon that judgment, against the lands and tenements of Thomas Smyth, and delivered to the sheriff of the district of Johnstown (in which these lands are situated), the sheriff seized the lands and premises in the bill of complaint mentioned *as belonging to the said Thomas Smyth*, and on the 26th August, 1825, put them up to sale in the usual manner, and sold them to Charles Jones, as the purchaser at the said



sale, for £105; that on the 27th of August, 1825, the sheriff made a deed under his seal of office, whereby he conveyed to Chas. Jones in fee, as the highest bidder, the said land, so far as he lawfully might, and all his right, title and interest, as sheriff, by virtue of the said writ of execution, of and in the same; that the said Charles Jones, on the 30th July, 1827, in consideration of £600 to him paid by Trueman Hicoek and James Simpson, granted, bargained, sold and released to them in fee, as tenants in common, all his right to the said land, to hold in proportion of two-thirds to Hicoek, and one-third to James Simpson; that, on the 21st January, 1831, Hicoek, in consideration of £500, transferred and assigned to Jas. Simpson his right and interest in an undivided one-sixth part of the land, in addition to the one-third already held by Jas. Simpson, thereby making them tenants in common in fee of equal moieties; that T. Hicoek, on 11th April, 1831, in consideration of £1000, conveyed to James Simpson in fee another undivided sixth part of the land, whereby James Simpson became seised of two-thirds of the whole estate, Hicoek continuing seised of the other one-third; that on 2nd May, 1831, Hicoek, in consideration of £1000, conveyed all his estate and interest in the 400 acres of land to Abel R. Ward in fee; that on the 21st February, 1832, James Simpson and Able R. Ward, then being seised of the whole estate as tenants in common, conveyed all their interest in the 400 acres of land to William Simpson, the then sole defendant in the suit, for £5000, to hold in fee simple; and the plea concluded by denying that the plaintiffs had any interest in the estate.

This plea came on to be argued before his Honor the Vice-Chancellor on the 30th July, 1841, when it was overruled, with costs.

The defendant, on 13th April, 1842, put in his answer to the bill; in which, among other things, he set forth that the purchase made by him from Hicoek of the whole estate in the premises, was for the benefit of himself and of Abel R. Ward—the latter having agreed to hold one-third in common with him; that they afterwards made a partition, and thus became possessed of separate parts of the premises; that under the statute 8 Geo. IV. ch. 1, for the construction of the Rideau

Canal, certain portions of the land have been taken for the use of the canal, and are become vested in her Majesty; that the land having become desirable for the site of a village, and believing himself to be seized of an absolute and indefeasible title in fee simple under the circumstances set forth in his answer, he laid out a village plot thereon, and has from time to time sold and leased village lots to persons, who have erected houses and made other improvements, and he specifies in a schedule annexed to his answer the particulars of all these sales and leases. He states further, that Abel R. Ward has made also many similar sales of lots from his portion of the land, of which he (Simpson) is unable to give the particulars; and, after setting forth facts upon which he relies as entitling him to hold his portion of the land free from any equity of redemption on the part of the plaintiffs, he insists that the several persons whose names are given by him, as having purchased or leased and improved portions of his part of the 400 acres, should be made defendants, and also Abel R. Ward and those claiming under him, and that her Majesty's Attorney General should be made a party in respect of the portions of the land set apart and held for the use of the Rideau Canal, and now vested in her Majesty.

On the 24th December, 1842, the respondents amended their bill, making Abel R. Ward, Henry Glass, *Patrick Tierney*, *William Brown*, *Arthur T. Ward*, Henry Lake, Elijah W. Boyce and Rufus Collins, parties. The amended bill sets forth the facts stated in the answer respecting the partition between William Simpson and Abel R. Ward, by deed made on 5th June, 1834, and charges that Simpson had conveyed to persons named in the schedule annexed the village lots therein specified, being parts of the 400 acres; and that Ward had also disposed of other lots, of which the particulars were unknown to the respondents; that Charles Jones, T. Hicock, James Simpson, Abel R. Ward, William Simpson, and the several purchasers from William Simpson and Abel R. Ward, had notice of the mortgage when they acquired their interest; and that William Simpson and Ward, and the several purchasers from them, have been in possession of the mortgaged premises from 5th June, 1834, and are still in possession.

The bill prays—

1st. An account of what is due on the mortgage, and of the rents and profits received by the appellants and *others the purchasers* of any of the said village lots *so conveyed*; and that the respondents might be allowed to redeem on paying the balance, if any be found due, and prays a reconveyance.

Or, 2ndly. Prays an account of rents and profits *received by appellants*, and that on payment of a *proportionate part of what may be due* on the mortgage, after deducting such rents and profits, they may be allowed to redeem so much of the premises as appellants are interested in, and that the same may be reconveyed to them, and that any surplus of the rents and profits may be repaid to them, *without prejudice to their proceeding against the other purchasers* of the said village lots, for the redemption of the same.

Or, 3rdly. That if, on taking the last mentioned account, anything shall be *found due upon the mortgage*, the respondents may, on paying such balance, be allowed to redeem such parts of the premises as the appellants are interested in, and that the same may be reconveyed to them, or any surplus of the rents and profits paid to them; and that W. Simpson and Abel R. Ward may pay to the respondents the value of the residue of the mortgaged premises, and a compensation for the rents and profits thereof not accounted for, or the purchase monies received in respect thereof, with interest from the times of receiving the same, at the option of the respondents.

Or, 4thly. That upon payment to Simpson and Abel R. Ward, of any balance due on the mortgage, after deducting rents and profits received by them, the respondents may be admitted to redeem such parts of the premises as those two "*continue interested in*," and to have the same reconveyed—and any surplus of rents and profits to be paid to the respondents; and that they may pay to respondents the value of the residue of the mortgaged premises, and a compensation for the rents and profits not accounted for, or the purchase monies received in respect thereof with interest, at the option of the respondents; concluding with a prayer for general relief.

The schedule referred to in the bill contains the names of

twenty-nine persons as purchasers (if I understand it correctly) of village lots, some of them holding more than one. Ten of these lots are stated in it to have been "*conveyed*;" whether the purchase money may have been paid on those, or the whole or any part of the price of those not conveyed, does not appear. Several lots are stated as having been leased; but for what periods, or on what terms, is not stated. Some are set down merely as being occupied by different persons named; others, as having houses built upon them. Two lots are set down as having been conveyed to trustees for a Presbyterian church, and one to trustees for a Roman Catholic church.

The appellant Glass stands in the schedule as the purchaser of a lot conveyed; Tierney, of a lot sold, but not conveyed; Brown, of two lots sold, but not conveyed; Arthur J. Ward, the same; Lake, the same; Boyce, as the purchaser of one lot not conveyed; Collins, the same.

In all, sixty-two village lots are mentioned as having been sold and conveyed, or sold and not conveyed, or leased, or merely built upon, or occupied.

And among the purchasers who are not made parties, are some who are stated in the schedule to have received their conveyances, and some also of each of the other descriptions. The bill contains no statement accounting for the not making many of these persons parties, and it does not appear why any of those who have been made defendants in the amended bill should have been made parties more than some of those who have been omitted.

On the 25th March, 1843, William Simpson put in a demurrer to this amended bill, for want of parties, which being argued before his Honor the Vice-Chancellor, on 11th July, was over-ruled.

The defendants Abel R. Ward, W. Simpson, and Glass, severally answered the amended bill, and Lake, Boyce and Collins answered jointly.

On 4th June, 1845, after evidence had been taken, the cause came on to be heard, when his Honor the Vice-Chancellor made a decree in substance as follows: That an account be taken of the money due on the mortgage, and of



the *present* value of the improvements made by the appellants on the lands in their possession, or claimed by them ; that an occupation ground rent be set on such lands by the master, for the time they or their tenants have occupied, and also on the lands sold, while they were so occupied before sale ; that an account be taken of the mortgaged land sold, and of the monies received by the appellants on account of such sales, and interest calculated thereon ; that the mortgage money and interest, and the value of the improvements, be set against the ground rent and purchase monies received by the appellants, with interest ; and balance paid by one party to the other accordingly ; that the appellants shall convey to the respondents such of the mortgaged lands as continue vested in them ; that appellants shall assign to respondents any contracts which they shall have made for the sale of any of the mortgaged lands remaining open and unperformed ; that the mortgage money and interest shall be divided rateably among the appellants in proportion ; and that each shall receive the value of his own improvements, [after deducting] such ground rent as aforesaid in respect of the lands occupied by himself or his tenants, and *such part of the purchase monies as he has received, with the interest thereon.* The master to make all just allowances.

From this decree the defendants in the cause below appeal : and the orders of his Honor the Vice-Chancellor, overruling the plea and demurrer, are also appealed from.

The plea rests the defence upon the ground, that whatever interest the mortgagor Smith retained after the mortgage, was divested by the sheriff's sale under the *fi. fa.*, and that his devisees have consequently nothing to redeem. That is a point so inseparable from the merits of the case, that it is impossible the respondents could have a decree in their favor, if we should be of opinion that the equity of redemption, passed by the sheriff's deed to Mr. Jones ; but when we are asked to entertain the question upon an appeal against the Vice-Chancellor's order overruling the plea, the first point to be considered is, whether Simpson is in a situation to appeal from that order. I apprehend he is not. If, in case of his having promptly appealed from the order over-

ruling his plea, he might nevertheless have been compelled to answer before the appeal could be disposed of, then it would have been contrary to reason to hold, that by afterwards answering he had waived his appeal. But he would not have found himself in that situation. It seems to have been at one time a doubtful question in England, whether upon an appeal in an equity suit, the proceedings in the court appealed from were suspended by the appeal; and many years ago the House of Lords appointed a committee to consider and report upon that point.

It appeared obvious to the committee, upon investigating the subject, that many great inconveniences must follow if the parties could not be restrained from proceeding in the cause as a matter of course, notwithstanding the appeal; and that, on the other hand, injustice as well as inconvenience might follow, if all proceedings in the cause in the court below must be held to be absolutely suspended, so that no step could be taken under any circumstances or for any purpose.

Upon the report of the committee, the principle was adopted, that an appeal should be considered as not tying up the party who has succeeded below from proceeding, but that it should be left to the appealing party, if he should desire to restrain proceedings, to apply for that purpose. And this seems to be the settled practice at the present day. It seems also to be required (though that was not contemplated at the time the rule was resolved upon) that the application should be made in the first instance to the court below.

We must suppose then, here, that if Simpson had appealed at once from the order overruling his plea, he would not have been compelled to answer while the appeal was pending; and by voluntarily answering, and stating in his answer the same matter which he had made the ground of his plea, he submitted, I think, to the order overruling his plea, and waived his right of appeal from it (a). If I am in error in this point, on which I am not so competent to judge as his honour the Vice-Chancellor, the error would not be material so far as

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(a) 1 Jac. & W. 636; 4 Russell, 560.

the plea is concerned; for it is equally my opinion that the plea was properly disposed of, and that the appeal against the order should on that ground also be dismissed. The Vice-Chancellor no doubt was aware of the doctrine constantly maintained in the common law courts in this country, that an equity of redemption is not such an interest as can be sold under a writ of *fiery facias*; not being the subject of execution upon legal process. And if he had decided otherwise than he did, it would have been such a departure from the maxim that "equity follows the law," as might have led to inconvenient consequences, and indeed to great confusion. I take it to have been determined in the Court of King's Bench, and well understood from an early period, that the mortgagor of an estate, especially after the conveyance has become absolute in law by his failure in performing the condition, has no interest that can be taken and sold in execution under a *fi. fa.*, either at the suit of the mortgagee or of any other person.

That certainly was taken to be a point established before I came to the bench, which is seventeen years ago, and I believe I might even say, before I came to the bar.

It was determined at a time when the decisions of the court were not reported, and the grounds therefore upon which the judges of that day came to the conclusion do not appear. Whenever the point has come up of late years, the law has been assumed to be as I have stated, and there has been little or no argument upon it.

I think it very probable that the question has never before been so elaborately discussed in this country, as it has been before us on the present occasion, though I do not suppose that any of those considerations which must have been decisive of the question had escaped attention hitherto. They must inevitably, I think, have presented themselves.

We may take it for granted that the foundation of the decision has been the principle so broadly laid down by the Court of Common Pleas in England, in *Preston v. Christmas* (a), "that an equity of redemption is nothing at all in "the eye of the law;" though certainly in some previous

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(a) 2 Wilson, 86.

cases it had been considered so far at least of value, that the release of such an equity had been held to be a sufficient consideration to support an assumpsit (a). This is not inconsistent however with the doctrine stated in *Preston v. Christmas*. Much must of course depend upon the purpose for which, and the proceeding in which, a court of law may be called upon to recognize its value. No doubt it is an interest, though not a legal interest; and it may be of actual value, though it may have no legal value. It is no argument to say that an equity of redemption may be devised, for an equitable interest is as much devisable as a legal interest: and we could not maintain that whatever interest might pass by a devise could be seized under a common law execution, for that would be holding what no one would think of contending for, namely, that an estate which a debtor has merely articulated for, may be sold as his under a *fi. fa.*; for unquestionably he has an equitable freehold which might be devised. The plea states that, upon the judgment against Thos. Smyth, a writ of *fi. fa.* issued against his "lands and tenements," under which all his interest in these mortgaged lands was sold. If at the time these lands were the lands or tenements of Thomas Smyth, then the writ would attach upon them; or rather perhaps I should say, if he had a legal estate in them higher than a mere chattel interest, such legal estate could have been sold under the writ. But it is admitted on all hands that his interest was a purely equitable one; for if he had an interest of any kind remaining in him after the mortgage and after his default, it was nothing more than a right to pursue a remedy in a court of equity at some future day, if such a court should ever be established in this country, there being no such court in fact at the time, and no certainty that there ever would be.

Assuming that we are now at liberty to go into this as an open question, it has been contended that the cases of *Lyster v. Dolland* (b), and of *Scott v. Scholey et al.* (c), do not in the nature of things apply, first, because they were mortgages made of terms for years only, and not of a freehold estate, and therefore the equity of redemption in those cases could

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(a) 1 Lev. 273; 2 Ld. Ray. 663.

(b) 2 Br. C. C., 498; S. C., 1 Ves. Jr. 431. (c) 8 E. R. 467.



not be extended as trust estates, under the 10th section of the Statute of Frauds, because the trust estates which are by that statute made extendible, are intended to be trust estates of freehold only, and not leasehold trust interests; and secondly because the question in those cases in England came up on the effect of an execution by *elegit*; now it is quite obvious that an equity of redemption could never be extended upon an *elegit*; for the effect of that would be to take the estate out of the actual possession of the mortgagee, which would destroy the effect of his security, and would be quite inconsistent with the object of the mortgage and the intention of the parties. No doubt that is so; and that it may therefore be said with truth, that some of the grounds on which it has been held in England, that an equity of redemption in a term for years cannot be extended as a trust estate under the Statute of Frauds, do not apply to the question whether an equity of redemption in a freehold estate in Upper Canada can be *sold* there (not *extended*) under the effect of the British statute, 5 Geo. II. c. 7, which allows real estate in the colonies to be sold in like manner as goods and chattels for the payment of debts. But it is nevertheless quite impossible, I think, laying such grounds on one side, that a court of common law in this province could have held consistently with those decisions and with the principles upheld by them, and particularly by Lord Ellenborough's judgment in *Scott v. Scholey*, that an equity of redemption in a freehold estate could be sold in this country under a *fi. fa.* The Statute of Frauds in England, which allows trust estates to be extended in execution, has been taken to be confined to cases of naked trusts, where the whole beneficial interest in the estate is in the cestuique trust; that is, to the simple case of an estate held by A. B. in trust for C. D.; and an equity of redemption, which is no trust created by contract of parties, but a mere right to pursue a remedy extended by the indulgence of a Court of Equity, is held not to be a trust estate that can be at all within the contemplation of that statute, and so not an estate that can be seized and extended under the 10th clause. The only statutory provision then in the law of England in force here, which has in terms subjected equitable interests to common

law process of execution, does clearly not apply to the case, and this is admitted ; and there is therefore not only the argument that an authority to extend such an estate under that statute by *elegit*, would not be an authority at any rate to sell it under a *fi. fa.* ; but there is the further argument, that the only enactment by which the law of England has subjected trust estates in England to common law executions of any kind at the suit of a subject, has never been admitted to apply to an equity of redemption. And indeed, the reasons why an equity of redemption should not be liable to be sold under a *fi. fa.*, seem so strong as to be almost irresistible.

They are clearly brought under view in the argument of the case of *Scott v. Scholey*, and are strongly put by the court as grounds of their decision. It is true indeed, that it has been decided in England, and we have followed the decision here, that the estate of the mortgagee cannot be sold upon a *fi. fa.*, because in reality the extent of his interest is only to hold the estate till he is satisfied the debt, which in general is secured by a bond taken at the same time ; and the effect of selling, as his, the only substantial interest which he really does hold, would be to separate the securities, and place the estate in the hands of one person, while the debt would remain in another.

It does seem a singular state of the law, under which an estate can exist, not subject to execution, as being no legal property of any one ; not liable under an execution against the mortgagor, because it is held not to be his property in the eye of the law ; not under an execution against the mortgagee because he is not really and in substance the owner, but only in form, as a means of compelling payment of a debt secured upon it, which is his only valuable interest in the land. But this only shews the more clearly, that it is in equity alone that the remedy can be properly and conveniently sought, with safety to the claims and interests of all parties. A purchaser of an equity of redemption under a *fi. fa.*, attended as the right is with equities of a peculiar kind, arising from circumstances which neither he nor the sheriff can know, and over which the court of law issuing the process can have no control, would be in a most unsatisfactory position ; and it

would be highly to the prejudice of the mortgagor, that his equitable estate should be forced from him under a legal process, at the price that a stranger might think it prudent to give for it under such disadvantage. The judgment creditor has his proper remedy in equity, for he is admitted there to be in a position to redeem, by paying off the encumbrance.

Of course it was never reasonably to be assumed, without argument, that the statute 5 Geo. II., ch. 7, which I have already referred to, did not place us in so different a position in regard to this question, that it ought to lead to a contrary decision, respecting the right to sell the equitable estate under an execution.

I have a distinct recollection of hearing it more than once relied upon for that purpose ; but this court has never held that there was anything in that act, that could warrant them in confounding legal and equitable remedies, by holding that under a *fi. fa.* against the lands and tenements of a party, land could be sold as his, of which the legal estate was in another. Whether we regard an equity of redemption as "*lands, hereditaments,*" or "*real estate,*" which words are used in the act, it must by the terms of the act, "*belong to the person indebted,*" before it can be made liable to the payment of his debts. In the view of a court of law, an equity of redemption is nothing "*belonging to*" the debtor which it can recognise or is authorised to deal with, for the law looks only to the legal estate. In the view of equity it is an interest, and one to which it can give effect, and in such a manner as to suit the just claims of all ; and therefore when the same act, after making real estates liable for the payment of debts, provides that they shall be "*subject to the like remedies, proceedings and process in any court of law or equity for*" "*seizing, extending, selling, or disposing of them, as personal*" "*estates are subject to, in the same colonies, for payment of*" "*debts;*" the legislature seems to have preserved the subject from confusion by sending parties either to law, or equity, according to the nature of the interest to be made liable.

And with reference to another part of the same clause, an equity of redemption doubtless, by the law of England, descends to the heir, and is liable in his hands to the satis-

faction of specialty debts ; but nevertheless it was never liable to legal process of execution—it could be reached only in equity.

If the question were now before us as an undecided point, there were arguments not ingeniously merely, but very forcibly put, upon the construction of this statute, and upon the remedy given by 25 Geo. III., ch. 35, for the sale, not only of lands, &c., but “*of the right and interest in lands*” belonging to debtors to the crown, and upon the sale of equities of redemption under that statute, which would all require to be considered and carefully stated, and disposed of. I do not enter upon these now, because I hold that upon a question of this kind, we are bound by the state of the law as we find it settled by former decisions ; and for the additional reasons, that as regards the plea itself, I think any appeal is waived ; and indeed in the view which I take of the case upon the merits, the effect would be the same, whether I thought the equity of redemption was in this case bound by the sale on the *fi. fa.*, or not.

I will only add therefore, that it is my present impression, after hearing an argument which has thrown much new light upon the question, and which probably indeed has placed it in every light in which it is capable of being placed, that the courts of law in this country, when that question was first presented to them, could not, in the face of those principles of English law, and decisions of English Courts, which were unquestionably binding upon them, have held otherwise than they did, unless the 5 Geo. II., ch. 7, had the effect of placing the subject upon such totally different ground, as to subject such an equitable interest in the colonies to legal process in opposition to the principles established in England. I am not yet convinced that our courts could properly have ascribed such an effect to that statute, and at all events they have not done so, but have on the contrary always held the sale of an equity of redemption under a *fi. fa.* as a wholly insignificant act, refusing to recognise it as having any binding effect upon the title. The question, though it has come up here in an equitable suit, is a strictly legal question, looking at the purpose for which it is entertained. If twenty or thirty years ago, and after the first decision had been made, the judges of this court had upon more mature deliberation changed their opinion, they were no doubt at liberty to over-rule their first impression ; but I consider it to have become the settled doctrine of the courts of common law, consistently maintained in this country for a great number of years, that such a sale as was made in this case transfers nothing. We cannot tell how many cases may



have occurred, in which mortgagors, whose interests have been attempted to be bound by such sales under execution, may have afterwards sold their interest to purchasers for value—both parties relying upon the known doctrines often recognised and stated by the court. In questions of this kind, relating to rights of property, and especially real property, it is always held to be incumbent on the courts to adhere to adjudged cases. If these seem to lead to inconvenient or even to absurd consequences, as they have been sometimes admitted to do, still it is considered right, for the sake of certainty, to abide by the generally known and understood rule, leaving it to the legislature, if they shall think fit, to alter it, rather than to shake confidence in the state of the law, and produce uncertainty in the dealing with and advising upon titles, by departing at pleasure from established decisions, and giving effect from time to time to the varying opinions of different judges upon the same points.

It would certainly seem strange here if, when the Vice-Chancellor has decided in accordance with the constant course of the Queen's Bench, in refusing to give effect to a sale of an equity of redemption under a *fi. fa.*, his decision should be reversed by the judges of the same common law court sitting in appeal from his judgment. I think, therefore, that the appeal from the order overruling the plea should be dismissed with costs, upon the double ground that the right of appeal as to the plea was waived, and that at any rate the plea was rightly over-ruled, considering the manner in which attempts to sell equities of redemption, by common law process, have been hitherto treated by the Court of Queen's Bench in this country.

If it be thought desirable that recourse should be had by a creditor against this particular description of interest, otherwise than through a court of equity, it must be left to the legislature, I think, to change what I regard as being now the law of Upper Canada on this point; but it seems to me that the matter would require to be very well considered before any such change is ventured upon.

The order overruling the demurrer put in by Wm. Simpson, is the next matter appealed from; and, in respect to this order also, I think the right of appeal was waived by the defendant afterwards putting in an answer: it seems to rest upon the same point of practice in that respect as the plea. The cases of Wood v. Milner<sup>(a)</sup> and of the King of Spain v. Machado<sup>(b)</sup>, are in point. In the former, the court, in order to prevent the party from being concluded by answering, entertained

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(a) 1 J. & W. 636.

(b) 4 Russell 560..

an application from him to extend the time for answering ; and they made it a condition for his protection, that he should not be prejudiced by making the application, on the ground that it was a waiver of his appeal against the demurrer.

If this defendant had been in a situation to insist on his demurrer for want of parties, my doubt would have been, whether the mere circumstance that relief is prayed for in one shape in the bill, by which the absent parties cannot be affected in interest, would be an answer to the objection. It is averred in the amended bill, that all the purchasers under Simpson and Ward respectively had notice of the state of the title. They are not so numerous (so far as the facts appear in the first answer to the amended bill) as to bring the case within the reason of any decision, where inconvenience alone may have been received as a ground for not bringing into court all who have so direct and clear an interest. Neither could the necessity here be held to be dispensed with upon the principle that those who are made defendants can be looked upon as representing others who are absent, either by being appointed to represent them, or from the nature of the relative situation of the parties. Nor does the bill contain any statement of reasons or impediments, on account of which the respondents have not conformed to the general course of the court.

Under such circumstances, it seems to be conceded, that no decree could properly be made, which would be consistent with the relief prayed for in the three first alternatives of the prayer in the bill ; but it is contended, that the fourth alternative involves nothing by which any of the purchasers not made defendants in the bill could be effected, if indeed the same could not be said of the relief prayed in the third alternative.

We could only of course determine the question by what appears on Simpson's first answer, and the amended bill, not noticing the evidence or the decree which has in fact been made ; because these are subsequent to the demurrer. And if it could be said with absolute certainty that a decree made in strict accordance with the fourth alternative, could not affect any but the appellants ; and moreover, that sustaining the bill in that shape, would not tend to unnecessary litigation, by occasioning a multiplicity of suits, when one could have been made to answer ; then it would seem reasonable that the party might be allowed to proceed against these appellants alone. But there is nothing in the bill by which the respondents do in terms preclude themselves from seeking redemption hereafter, in respect to the holders of other portions of the mortgaged estate. They do indeed propose

to take the purchase money received upon sales of such parts as Simpson and Ward "*do not continue interested in ;*" and they only ask to redeem such portions of the mortgaged premises as Simpson and Ward "*still continue interested in ;*" that is, they only *now* pray to be allowed to redeem as to such portions. All that can be said of this is, that having asked for the purchase money, if they should be decreed it, they can never afterwards be allowed to redeem the land ; but what has been in fact done upon their prayer would have to be shewn hereafter, if they should, as they might, attempt to redeem against these other purchasers.

They do not expressly relinquish their right, nor consent to forego it in direct terms. And besides, the respondents by their bill desire relief in any of the four ways suggested ; not agreeing to take one and waive the others, but reserving the right of course to contend at the hearing for one mode of relief as well as for the other ; and they would go down to the hearing, as we must suppose, meaning to press most earnestly for that which would give them the fullest measure of relief ; for the first alternative if that can be got, if not, for the second, and so on. It is not the case of a plaintiff, on the hearing of the cause, proposing to take a decree which shall save the interest of all absent parties. The question upon the demurrer is, whether a plaintiff can be allowed to go down to the hearing, and to take evidence before the hearing, upon a bill which certainly does pray redemption against a number of parties who are not made defendants in the cause. Have they not an interest in being heard, for fear the court may, though they need not, make a decree which may affect their interest ? And though such decree might not in fact be suffered to affect them, on account of their not being made parties, yet the course of the court requires that they shall have before them all whose presence may be necessary for enabling the court to deal finally, effectually and justly with all the interests involved. The plaintiffs, as it seems to me, though I express the opinion with very little confidence, from not being conversant in equity proceedings, could hardly be allowed to say in answer to the demurrer, " We will at the hearing take a decree in such a shape as that the absent parties can have no concern in it." The court, I think, must say to them, " You should have framed your bill and brought your suit in such a manner as that the court might deal with it as justice and their rules require. Whereas here, relinquishing nothing, you have asked for several things which we cannot grant you in the absence of parties who are by your



“own shewing interested in opposing your claim (a). And “you do not limit your prayer so that we can say, we should “be stopping short, with your assent, of granting all that you “are claiming.” The decisions in England seem to support this view. And besides, I do not see that we could hold that the relief, in the narrowest shape in which it has been prayed, is certainly not open to the objection of want of parties. The respondents pray to redeem all the portions of the mortgaged premises which Ward and Simpson “*continue interested in.*” They “*continue interested*” in such parts as they have sold but not conveyed, on account of the purchase-money being unpaid and in such portions as they have leased. The schedule which forms part of the bill shews, that they have leased several lots to persons who are named, and have sold lots to others, which are not yet conveyed. I do not assume that it was necessary the lessees should have been made parties, but the purchasers of lots not conveyed have *prima facie* an equitable freehold; and I am not sure that we should be safe in assuming that they must not be made parties to a bill which seeks to redeem their portions.

It has been urged that if on these, or any other grounds, the bill is defective for want of parties, such an objection amounts in effect to a denial of jurisdiction over the case in its present shape, and is an objection too substantial to be waived by any step which may be taken by those who are in fact made defendants; for that it might be made by any one, even as *Amicus Curiae*. I have no doubt that either the court upon the hearing, or this court upon appeal, might order the cause to stand over till the defect should be supplied. But as a demurrer would not be allowed to be filed by an *Amicus Curiae* having no connection with the cause (b), so I take it that the objection, so far as it depends upon the demurrer merely, is at an end, when the demurrer being over-ruled, the defendant, instead of appealing against the order, submits to it, and puts in his answer. I think the appeal as to that order must, on that ground be dismissed with costs. (c)

The substantial question in this case upon the merits, and that to which the counsel on both sides chiefly applied them-

(a) Richardson v. Hastings, 7 Beavan, 306; and Lidbetter v. Long.

(b) 1 Dickens, 707, 799.

(c) As regards the costs of the appeal from the order over-ruling the demurrer, it was suggested by the counsel for the appellants when the judgment of the court was given, that the respondents ought to have petitioned against the appeal and not consented to go to argument upon it, and that not having insisted upon the waiver, they have no claim to the costs of the appeal, which they have without necessity suffered to be incurred. This court having so decided under the like circumstances in the case of Smith & Crooks v. Rhodes, the court followed that decision here, and the appeal was in fact dismissed without costs.



selves, is whether, upon the facts proved, the respondents ought to be allowed to redeem as to any part of the premises, or whether they can and ought to be refused the privilege of redemption, which they claim *as a right*. The case, in that view of it, has been argued with remarkable ability, and such a degree of talent and industry has been shewn on both sides as does great credit to the gentlemen employed. The question is one highly interesting in its nature, more especially from the application which the decision may have in other cases which are known, and probably in very many that have not yet engaged attention. The value too, of the interests involved in the case itself is very large; certainly not less than many thousand pounds, taking the desired redemption in the most limited extent that has been suggested.

We must look upon the case, I think, as turning upon that provision in our own statute-book, which has been made the main ground of the argument on the part of the defendants, I mean the 11th clause of the 7 Will. IV., ch. 2; for independently of that provision, it did not seem to be put with much confidence, that the right to redeem could be denied; or rather, I should say, it did not seem to be very earnestly contended, that taking such a case to have arisen in England, there is anything in the mere conduct of the parties, that upon the ground of acquiescence or otherwise could have been held to have extinguished the equity of redemption, however strongly it might have operated in regard to compensation.

There are some points in the evidence, however, bearing upon that view of the subject, which I think would be felt to call for attentive consideration, and for a much more careful examination of adjudged cases than it has been in my power to make since the argument, if the case were to be taken up on that ground alone. Nothing was cited on the argument, that appeared to me to go the length of justifying the withholding the redemption on such grounds as are here shewn, if all that has taken place here had taken place in England, where it would have been open to the parties, during the whole period, to take such equitable proceedings as their view of their own interests might have prompted them to. To determine what it is just to do, considering the state of things which has existed in Upper Canada, at and from the time when this mortgage was made, and considering also the provision which the legislature has thought it reasonable to make on account of that state of things, is the question to which I shall think it more proper to confine myself. His honour the Vice-Chancellor has intimated that having been given plainly to understand, while

the case was before him, that an appeal would follow whatever course he might take in disposing of the case on the merits, he did not give the same anxious consideration to it, as he must otherwise have done, on account of the great interests involved. We might probably look upon it as almost equally certain, that our judgment upon appeal will not be acquiesced in by the losing party, whichever it may be. And, indeed, though we would unwillingly see a suitor in any hopeless case, incur the very formidable expenses which unfortunately seems inseparable from an appeal to the Privy Council, notwithstanding the late improvements in that appellate jurisdiction, yet one cannot but desire that the opinions which we may form upon the questions now submitted to us should be reviewed by a higher court, for the sake of others who may be interested in it, as well as of the parties now before us. If this should happen, there are some peculiarities in the proceedings which will probably be looked upon in England as inconvenient departures from the ordinary course of practice in equity, particularly in regard to the taking and publication of evidence, according to the practice which has obtained under our Chancery Act. The appellants complain of this as having subjected them to great disadvantage in regard to the evidence given by Covell, one of the respondents' witnesses; who being (as they allege) a man of reckless character and notoriously intemperate habits, and having, as appears by his evidence, a direct interest sufficient at least to occasion a strong bias, has been procured, as they complain, to give answers deliberately framed and contrived to support the respondents' case in all points, and to repel the defence set up by the other side, after the opportunities which the method of taking evidence under our statute admits of, of knowing all that had been proved on the part of the defence. With regard to the character and habits of the witness nothing was proved, and therefore no allowance can be made on that score; and his evidence must be estimated by our own means of judging of the probability of its truth, upon the face of his statements, and by a comparison with the testimony of other witnesses, to which it is certainly on some points very much opposed.

His honour the Vice-Chancellor, as I understand from him, decreed according to the prevailing impression on his mind, that the Chancery Act gave him no power, under any circumstances, to withhold redemption altogether, when it would not, under the same circumstances, be withheld in England; but merely to restrict it upon his view of the facts, by imposing such terms as he should think just. He

accordingly has allowed redemption ; and, under his view of all the facts proved, and in the exercise of the discretion which the statute gives him, he has framed such a decree as he believed would meet the justice of the case. This decree is appealed from, and various exceptions have been taken to it, which regard only its particular terms. They are complained of as being, several of them, repugnant and inconsistent as well as unreasonable, and not calculated to meet the justice of the case, admitting that a decree for redemption was inevitable. But the defendants do not merely complain of the terms of the decree ; they appeal against it on the grounds first, that the Court of Chancery had the power, under the act, to refuse redemption altogether ; and, secondly, that the circumstances of this case render it proper that redemption should be refused. The respondents contend against both these positions. My judgment is with the appellants on both points—without hesitation as regards the first, and after weighing as carefully as I am able all the evidence which must be considered in determining the second.

I cannot prevail upon myself to doubt, that the eleventh clause of our Chancery Act gives to the Court of Chancery a power over the right of redemption in all cases coming within that clause, and that its operation is not to be confined to the mere adjustment of compensation, or other conditions. If its language should seem to admit of doubt in this respect (which it does not appear to me to do), a short reference to circumstances which we know, and must recognise, may help to explain it. The civil government of Upper Canada was organised in 1792. The legislature first sat in that year, and by their first act they provided that “in all matters of controversy relative to property and “civil rights, resort shall be had to the laws of England as “the rule for the decision of the same.” The trial by jury was next established, and a court of civil and criminal jurisdiction created, with the like jurisdiction as the superior common law courts in England. Courts of requests were organised for the trial of small causes, on the same principle as the courts of conscience in England ; and these were not held to the strict rules of the common law : but with this exception, if it can be called one, there was absolutely no court whatever authorised to proceed otherwise than according to the course of the common law. No court of equity was created, and no provision made for the exercise of an equitable jurisdiction, in regard to any one matter that belongs peculiarly to equity, nor any assurance held out by the legislature while they were introducing the English



law, in the year 1792, nor for more than thirty years afterwards, that there ever would be a court in Upper Canada authorised to administer what is in England called equity. In the year 1834 (so far as I am aware), the first allusion was made in our statute-book to a mortgagor's right to redeem. In ch. 16 of the statutes of that year, a short act was passed, for giving to a certificate of payment of the mortgage-money, when registered in the county register, all the effect of a reconveyance of the estate. And it was thought prudent to add a proviso, "that such certificate, if "given after the expiration of the period within which *the* "mortgagor had a right in equity to redeem, shall not have "the effect of defeating any title other than a title remaining vested in the mortgagee, or his heirs, *executors or administrators;*" by which the legislature seem to have apprehended, that otherwise a mortgagee, after acquiring an estate which ought to be held absolute in equity as well as at law, and after transferring such estate to some other party, might, by receiving the mortgage-money, and giving a certificate, defeat the estate of the purchaser. In the same year, the legislature passed an act, 4 Will. IV., ch. 1, adopting, with some modifications, many of the improvements in the law of real property, which has lately been made in England, upon the recommendation of commissioners; and in this act there is mention made, in several clauses, of equitable interests and estates, as distinct from legal estates, and provisions are made in respect to each, corresponding with those which had been introduced in England. Indeed, in 1827 or 1828, there had been discussions in the legislature and a movement made by the government towards creating an equitable jurisdiction; but nothing was completed, and the design was dropped, till it was taken up again in 1837. In the Canadian Real Property Act, just referred to (a), the limitation of twenty years is adopted with regard to any suits in equity for the recovery of land or rent, as well as in suits *at law*, with a proviso, such as the English statute contains, that this enactment shall not interfere "with any rule or jurisdiction "of courts of equity, in *refusing relief*, on the ground of "*acquiescence or otherwise* to any person whose right to "bring a suit may not be barred by virtue of the act." The clause in the English Act, respecting the limitation of time binding upon the mortgagor, is very closely followed; and at the end of the 43rd clause, in which provision is made limiting the time for suing at law or in equity for any mort-

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(a) 32nd clause.



gage-money, or rent charged upon land, or for any legacy, there is this proviso, which though out of place as regards part of the subject-matter, is not the less binding: "provided always, that in respect to persons *now entitled to an equity of redemption*, or to any legacy, the right to bring an action, or to pursue a remedy for the same, shall not be deemed to be extinguished or *barred by lapse of time, until the expiration of five years from the time that an equitable jurisdiction shall be established in this province, and in the exercise of its powers*; provided that shall happen within ten years from the passing of this act."

If no such court should be established within that period, it would seem that the legislature were willing that mere lapse of time should bar the mortgagor, though he could have had no remedy open to him in equity, in any case where, being out of possession, it had become necessary for him to sue for redemption.

Thus then, with the law of England introduced as the rule of decision in 1792, when our tribunals began to be erected—with no equitable jurisdiction existing—with no allusion in any law of the province, before the year 1834, to any such thing as an equity of redemption—and with such allusions, in and after that year, to that equitable interest and to mortgages, as I have mentioned, and with no other—the legislature, in the year 1837, passed the Chancery Act, 7 Will. IV., ch. 2, which for the first time gave the means of enforcing equitable rights in Upper Canada, for any purpose, or to any extent. This act, in its second clause, conferred upon the court to be created, and in which a vice-chancellor is to preside (the governor being chancellor), the same power and authority as are possessed by the Court of Chancery in England, "*in all matters relating to mortgages*;" and, in the same general terms, they gave the same power and control as are exercised by the Court of Chancery in England, over every subject, as I believe, which the system of equity embraces, enumerating expressly cases of fraud, trusts, dower, specific performances, &c., &c. But in regard to mortgages, and to that head of relief only, the legislature seems not to have felt it safe to commit the jurisdiction in such extensive terms, without accompanying it with the special and precise provision which has given rise to the question we are now considering, and which is contained in the following (11th) clause:—

"And whereas the law of England was at an early period introduced into this province, and has continued to be the rule of decision in all matters of controversy relative to

“property and civil rights ; while at the same time, from  
 “the want of an equitable jurisdiction, it has not been in  
 “the power of mortgagees to foreclose, and mortgagors,  
 “being out of possession, have been unable to avail them-  
 “selves of their equity of redemption ; and, in consequence  
 “of the want of those remedies, the rights of the respective  
 “parties, or of their heirs, executors, administrators or as-  
 “signs, may be found to be attended with peculiar equita-  
 “ble considerations, *as well in regard to compensation for*  
 “*improvements, as in respect to the right to redeem*, de-  
 “pending on the circumstances of each case ; and a strict  
 “application of the rules established in England, might be  
 “attended with injustice : be it therefore enacted, &c., that  
 “the Vice-Chancellor of the said court shall have power and  
 “authority, *in all cases of mortgage*, where, before the pas-  
 “sing of this act, the estate has become absolute in law, by  
 “failure in performing the condition, to make such order or  
 “decree *in respect to foreclosure or redemption*, and with  
 “regard to compensation for improvements, and generally  
 “with respect to the rights and claims of the mortgagor and  
 “mortgagee, and their respective heirs, executors, adminis-  
 “trators or assigns, as may appear to him just and reason-  
 “able under all the circumstances of the case ; *subject, how-*  
 “*ever, to the appeal provided by this act.*”

It was provided generally by the act, that appeals shall lie from the orders and decrees of the court, to the governor and council of the province, together with the judges of the Court of King's Bench ; but it seems as if the legislature, feeling that they were vesting by this clause, a most extensive discretion in the Vice-Chancellor, thought it well to guard it by making it *expressly* subject to appeal in order that it might not be supposed that the principle was to be applied to this case, which is to a great extent recognized in regard to other tribunals, that the exercise of a mere discretionary power conferred upon a court, or even upon an individual judge, is not subject to be reviewed, there being no precise standard of right or wrong by which it can be tried.

When the legislature were first dealing with the subject of mortgages in 1834, and were imposing limitations of time in order to quiet titles and claims, they naturally enough thought it sufficient, and at the same time incumbent upon them, to take care that they did not close the door absolutely against all equitable relief to the mortgagor, under whatever circumstances of hardship or injustice, by making time a bar, while for want of a tribunal, he never had had the

means of applying for a remedy only equitable in its nature; they therefore wisely avoided to prejudge cases that had never been heard, by keeping open the claims of parties till they could be made known to a court competent to deal with them. If they had not done this, they would have been prejudicing the position of mortgagors to a very dangerous extent by the statute which they were passing, for they were then for the first time imposing a limitation of time, and making it an absolute bar, and they were letting the time run during a period when a disability existed, which more than all others had a claim to consideration. Their proviso had merely the effect of keeping the subject open without prejudice, till the legislature should apply themselves to the erection of a court of equity, if they should at any time do so; and when the legislature came to take up the subject in 1837, they were evidently fully aware of the necessity of proceeding with great circumspection.

It may be thought, that they might have laid down some general rule for protecting mortgagors in a particular class of cases; as for instance, that where an ejectment had been brought by the mortgagee, and the mortgagor had not availed himself of the statute 7 Geo. II., ch. 20, by applying to stop proceedings on paying the debt and costs; or when, as in this case, the interest of the mortgagor had been knowingly suffered by him to be sold in execution, it should be deemed equivalent to a foreclosure; but either of these rules might in some cases have operated most unjustly. The 7 Geo. II. can only be used in cases when there are no accounts to be investigated, and no disputed payments, when nothing is to be done but for the master to make a computation upon the face of the mortgage. With regard to sale in execution, it would have been strange if the legislature, taking up the subject in 1837, had placed a particular class of mortgagees on so favourable a footing as compared with others, merely because they had adopted a proceeding which the only court of justice then in the country had always held to have been illegal and inoperative; and besides, either of these courses would have been, in effect, allowing mortgagees to foreclose at their pleasure, without the intervention of any court, without any regard to the disproportion which might in many cases have existed between the value of the estate and the sum secured on it, even at the time of the security being given, and without making allowance for any of those equitable circumstances which sometimes lead courts of equity to enlarge the time appointed for foreclosure, or even to



open the foreclosure long after the decree. To have adopted any number of years as a bar, while there had been no means of suing for redemption, would have had an unjust effect in those cases, of which their might be many, where the estate mortgaged was worth much more than the debt, where it had lain unoccupied and unimproved, without any change as to interests or circumstances which could make redemption unjust or inconvenient, and where the mortgagee, in being made to reconvey the property, on receiving his debt, with all arrear of interest, could sustain no other injury than the disappointment of an unrighteous expectation.

Suppose a strong case of this kind ; that a debtor in 1792, had mortgaged a tract of land worth £1000, to secure a debt of £200 ; that some time after forfeiture, the mortgagee had got possession, but had made no substantial improvements and had always afterwards refused to accept the debt and reconvey. By the time the Court of Chancery was established, the estate would have risen greatly in value, so that the disproportion between the debt and the security would be even greater than at first. Most men would admit, that if the mortgagor made use of the remedy as soon as the means were offered him, by the erection of a proper court, he ought not in such a case to find himself barred by mere lapse of time. The first question to be considered by the legislature was, whether an equity of redemption should be acknowledged as having existed at all, while there was no equity administered in the country. When it was determined that it should be acknowledged, then the hardship would seem striking, of allowing time alone to be a bar under such circumstances ; and I cannot say that in my view of the question, I should have thought it just if the legislature had refused redemption as a matter of course, in all cases where the mortgagor had not offered to redeem within twenty years, without regard to the value and circumstances of the property, and the ability of the party. I knew a case in my practice at the bar, where a person in 1795 or 6, had mortgaged a lot of land in Toronto for £10 lent him, which at that time, I dare say, was the full value of the estate. The mortgagor removed to another part of the province ; the mortgagee died and his family removed to England. The lot continued unoccupied and unnoticed, till, in 1820, or about that time, some one aware of its value, and, I believe, ignorant of the mortgage, traced out the owner of the lot, and made him an offer for it. Information was then gained of the incumbrance ; and before the proposed purchaser would close the bargain, the heir of



the mortgagee was written to, and acquainted fully with the circumstances. His answer was the liberal one, that he conceived he had no further claim than to receive the debt and interest, and would not stand in the way of the sale. The purchase from the mortgagor was concluded, and not long after the purchaser sold the land, as I understood, for about £2,000. All this took place before any court of equity had been established : but if the matter had continued open till afterwards, with no alteration in the property except the increased value from the growth of the town, it would have seemed hard that such an estate should have passed into the hands of the mortgagee for a debt of £10 ; and yet, perhaps, when the lot was mortgaged, the mortgagee would have been unwilling to take it as a payment. Circumstances of various kinds, arising out of the conduct of the parties, and the manner in which the property had been dealt with, might in some such case be thought to incline the scale against the mortgagor's right to redeem. As it was, there was the single question, whether the one or the other should have the advantage of the rise in value, not occasioned by the acts of either ? and equity gives that advantage to the mortgagor as the owner of the estate.

These are considerations on the side of the mortgagor. But the case of mortgagees also claimed attention from the Legislature. I believe it was an erroneous notion prevailing before the act was passed, with many who had no concern themselves in such transactions, that the want of a court of equity was a grievance to mortgagors only, because they had no means of suing for redemption. But I always thought the grievance was greater upon the mortgagees, and was felt by them in a much greater number of instances. There might now and then be a case where the mortgagee, after the day had gone by, was inclined to refuse the money and try to keep the estate ; but I imagine such instances have been rare. Where the mortgagee was not in possession, and had to bring ejectment, the 7 Geo. II. ch. 20, afforded the debtor the means of staying proceedings and relieving himself from the incumbrance by paying the debt and costs ; and it was often resorted to when he had the means of paying.

But the general course of such transactions was exceedingly unfavourable and perplexing to the creditor. Money might be lent or credit given by a merchant on the faith of a mortgage, and in the greater number of instances at an early day, it might be given upon unimproved land, upon

which no rents or profits were accruing. If the creditor had taken no such security, he might have sold the estate upon an execution for his debt, and he would then have run only the risk of other creditors stepping in before him ; but with this mortgage in his hands upon an unproductive property, perhaps worth no more, or even less than his debt and interest, what was he to do ? Powers of sale were not often inserted, they are a new expedient even in England, or at least have not been long in general use. Take a case strongly in favour of the creditor, and suppose him in 1792 to have taken a mortgage for a debt of 500*l*. upon wild land of no greater value ; in some parts of the province, and for very many years, the rise of the land in value would not keep pace with the interest on the debt ; the debtor might be reckless and indifferent, giving himself no concern about the debt or the estate, but yet declining to concur in a sale. When such a mortgage as we have supposed might have been taken, the law of England was in force here, without any provision made for equitable relief in any case ; by law, the estate would become absolutely the mortgagee's when the condition was broken ; and the only foundation for the idea of an equity of redemption is, that in England, where there do exist courts of equity, they have assumed power to grant the indulgence of redeeming after the day when the party at law has by default lost his estate. No such right had been in terms created here, and nothing would seem more hard or more questionable, on grounds of both law and justice, than that the parties must be held to have entered into the mortgage transaction, with a view to an imaginary equity of redemption, grounded upon an apprehension merely of a court of equity being possibly established at some future period ; though in the meantime there could be no means of enforcing the privilege, on the one side, or of guarding against it by foreclosure on the other. An argument something more than plausible might have been raised, I think, before the year 1834, against the existence of any such interest as an equity of redemption. Not but that it would be a very imperfect state of jurisprudence (as it certainly was), where parties must be left to the strict legal effect of their contracts, without means of equitable relief. Until 1837, however, parties were so left in this country, and may have found inconvenience from it in many other instances as well as in the case of mortgages, though from the nature of things they can now have no effectual relief. That there was in fact no court of equity before 1837, in Upper Canada, is very notorious. It was well

known that in the British West India Islands and some other ancient British possessions, there were courts of equity exercising their authority on no other foundation, than that the governor was by common law chancellor, in virtue of his custody of the great seal; but it seems to have been generally conceded, that since the Bill of Rights, 1 Will. & Mary, the crown cannot, by the exercise of its prerogative merely, erect any jurisdiction with power to judge, otherwise than according to the course of the common law; and it has not of late years been attempted to do so. Even in this province the governor had, as to some purposes, been considered as invested with the authority and jurisdiction of chancellor in consequence of his custody of the great seal, but never in regard to the exercise of any equitable jurisdiction. There was no court of equity accessible for any purpose till 1837; and during all that time the holder of a common mortgage had absolutely no means whatever of foreclosing; and his security must in most cases have been wholly unproductive, unless he were at liberty to deal with the estate as his own, either by selling, or applying it to purposes requiring such an outlay as no prudent man would venture upon in England until after foreclosure. In many cases no doubt some compromise was come to which cleared the way of difficulties; in others this could not be effected, and the creditor had recourse to the expedient of selling the land on an execution obtained in a suit for the mortgage money, and buying it in himself, supposing, that whether the proceeding would give him an absolute title or not, it would at least place him on better terms for dealing with his debtor, and might be deemed equivalent to a foreclosure by any future court of equity, where that effect at the time would not have been unreasonable. In other cases—and those I apprehend not a few—the mortgagee, either ignorant of any such thing as an equity of redemption, (which might be well excused under the circumstances,) or assuming that none would be held in after times to have existed in his case, has ventured, not perhaps till after great forbearance and repeated opportunities of redemption held out to his debtor, to deal with the estate as his own, and either to occupy and improve it, or sell it, rendering himself liable by covenants to others, or embarking his own means in extensive improvements. There may have been an idea in some persons' minds at that day, that if ever a court of chancery should be created here, it would not be allowed to rake into cases of this description, but would be confined either to those in which the estate had not become absolute before the court was created, or where



possession had not been changed, or the estate not transferred by the mortgagee; or at least, where twenty years, or some other limited number of years, had not elapsed.

I believe, however, that if any such principle had been adopted, some cases would have been discovered in which its operation (without power of relaxation) would have been manifestly injurious and unfair. The legislature, at any rate, seem to have thought so, and to have considered that the best way of guarding against it would be, by expressly committing to the Court of Chancery a full discretion to deal with every such case as it might think just upon a view of all the circumstances. The objection to such a course is, that it seems (at least in cases of a doubtful complexion) to leave the parties interested in a state of uncertainty, for they can only know what the court may think reasonable, at the end of an expensive litigation; but there is the same inconvenience in many cases where specific performance of agreements is sought, and in many other instances both in law and equity, where doubtful rights can only be settled by litigation.

It would be a great advantage, no doubt, if a certain rule could be established, by which all could measure their rights without necessity for resorting to law or equity; but that is not attainable, and least of all could it be expected to be attained in respect to contracts made and acted upon under such peculiar circumstances as I have stated to have existed here. There is no unprecedented violation of the legal constitutional principle in thus extending, with suitable caution, a new relief in regard to past transactions, which shall operate upon rights already acquired. Our own statute book, as well as that of England, is full of such examples. I will instance what has been done here by our Naturalization Act—and both here and in the British Parliament (*a*), by acts rendering valid marriages which had been illegally solemnized; thereby changing, in many cases, the course of descent after property had actually vested. But in both these instances, the legislature proceeded with what they considered due caution, according to the nature of the case.

There would be no difficulty in supposing circumstances in which, to allow redemption of an estate forfeited before the act, would be attended with such ruinous hardship that no one could think it reasonable or just. In England there have been often scruples expressed against the right to redeem having been carried as far as it has been, even when the means of foreclosing were always accessible. If in any case of this kind arising in Upper Canada, the injustice would

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(a) Irish Marriages by Presbyterian Ministers, 2 & 3 Vic. c. 3.



be greatly increased by the fact that there had been no means of foreclosing, I do not see how this court could see the injustice, and at the same time stand excused to the parties for suffering it to take place in the face of such unlimited control as is given to it by the Chancery Act, and given in words as plain as they are comprehensive. It was urged before us that the legislature meant only, in passing this 11th clause, that the court might extend the period for redeeming—not that they could contract it; in other words, that the control over the *right* was given only for the protection of the mortgagor, and that the mortgagee could claim nothing more under the act than a more liberal course as to compensation, that the practice in England would warrant. I think it is clear that we cannot uphold such a construction, and cannot relieve ourselves from the duty of exercising our best judgment upon the reasonableness of allowing redemption at all, as well as upon the conditions in case of allowing redemption. I think it is thrown upon us to say whether, upon all that is before us, *redemption should be allowed* in this case.

As it is really a very important general question, whether the 11th clause gives the Vice-Chancellor a discretion to refuse redemption in the cases to which it applies, or only a discretion as to the terms of redeeming, I will endeavour, after all I have said, to place my conclusion upon it in a shorter and more precise form, in the hope of making it clearer.

The legislature in 1792 gave us the law of England as our rule of decision. By that law, if a man who has mortgaged his property for a debt does not perform the condition, the estate of the other party becomes absolute; and he has this protection only at law against the consequences, that if the mortgagee, in order to gain possession, has to bring an ejectment, then a statute (*a*) gives him the privilege of paying the debt and costs at any time during the pendency of the action, and thus preserving his estate. The right of being relieved against these legal consequences by a court of equity in a country where no such court exists, merely because such a relief is commonly given in another country, where such a court does exist, is, as it seems to me, rather a questionable equity. From 1792 (when mortgages began to be made here under the English law) till 1834, no trace is to be found of the acknowledgment of the equity of redemption in the statute law of the province; and no means had been provided before, or were provided then, for making such an equity available on the one hand, or for fencing against it on the

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(a) 7 Geo. 2, ch. 20.

other. Under such circumstances it might well be doubted, and I believe was doubted by many, whether an equity of redemption could be considered as existing: and it might have been doubted by more whether, if there should be a court of equity established in the colony, it would have authority given to it to disturb the existing relation between mortgagor and mortgagee where the estate had become absolute, and the mortgagor had lost or given up possession before the court of equity was created.

When the legislature did create a court of equity, and gave it power to disturb the position of mortgagor and mortgagee under such circumstances, they took, I think, a bold step, but a just one, and one more wise and beneficial than if they had withheld that power. If, however, they had compelled, or even suffered, all such past transactions to be dealt with precisely according to the English rules of equity in regard to mortgages, they would have done wrong, because they would have been making no allowance for a very important consideration in each case—which does not exist in England in regard to any case—namely, that neither party, during all the time that had passed, had been enabled to avail himself of remedies which in England are constantly accessible; and under such circumstances the motives and conduct of both parties, the construction these should receive, and the force that should be given to them, may have a very material effect in determining what it would be just to do between them.

If the legislature had attempted to provide for all those past cases by certain general and inflexible rules, they would have taken, I think, scarcely a less unfortunate course than if they had declined to allow such equities to be noticed at all. In any given case, the true line to be taken would generally not depend upon any single circumstance, but on a combination of circumstances. They, took, then, a middle course, and as it seems to me the most rational, and the best under the difficulties of the case, when they had enacted the 11th clause. It is contended, that by that clause they have done no more than give a wider discretion in imposing terms, but that a mortgagor must of necessity, and notwithstanding that clause, be admitted to redeem, whenever, under the same circumstances, he would have been admitted to redeem in England. This construction overlooks the peculiarity which is recited as the very inducement to the enactment, and which makes it impossible for us to say that any case can have arisen in England in regard to the right either to foreclose or redeem, where the circumstances were similar

for no English chancellor, since equities of redemption were talked of, has ever had to decide what it might be just to do in a case of mortgage where many years had elapsed after forfeiture, without a court of equity to apply to.

I think that the legislature, if they took a reasonable view of what they were about to do under novel circumstances, and of the interests of parties, *ought to have intended* to give to the court a discretion as well over the right to redeem at all, as over the conditions to be imposed. I think they *did so intend*, and that the language which they have used in the 11th clause expresses that intention directly and plainly.

The proviso at the end of the 43d clause of our statute 4 Will. IV. ch. 1, cannot be treated as an enactment conflicting with the 11th clause of the Chancery Act, in the extended construction which I would give to the latter; for it merely provides that the lapse of twenty years after forfeiture shall not be of itself a bar to redemption, so long as there has been no court in which a suit could have been brought. It does not say that everyone who comes within twenty years *must be allowed by that court* to redeem. It is merely negative; and if it did conflict with the Chancery Act afterwards passed, of course the latter must prevail. Its only effect, however, is to keep the right to sue open. The respondents in this case, it is clear, were not barred by mere lapse of time. It was not contended that they were. Their suit, on the contrary, has been entertained and decided upon on the merits, and upon the construction of the 11th clause referred to, and under the clearly correct assumption, that the discretionary power given by that clause is to be exercised in all cases where the estate had become absolute before the act passed; and not merely in cases where the party might otherwise be barred by lapse of time.

I come, then, to the second question, and this calls for a judgment upon the merits, admitting that the Vice-Chancellor had the discretionary power to decree or withhold redemption under the 11th clause. I am not aware that his Honor the Vice-Chancellor is to be understood as having come to a conclusion upon that point, being inclined, as he was, to think that the statute gave him no peculiar discretionary power over the right to redeem. I think the case a very strong one against the right of redemption, and one in which the legislature, if they had such facts under their view when they were passing the 11th clause, would have desired to withhold it. I shall state the leading facts, without going into all the details; for, if redemption is to be refused in any case where it is not barred by time, it ought



to be upon the general complexion of the transaction, and not upon a critical examination of minor points.

The mortgage was made by Thomas Smyth, the father and deviser of these respondents, in 1810, to secure a debt of 233*l.*, due to a merchant resident in Boston, Mr. Sewall. The property mortgaged was 400 acres of wild land, not of good quality in regard to soil, but situated upon the Rideau River, and having the advantage of a waterfall, which at a future day, when the country should come to be settled, might be expected to be valuable, though of less value from the circumstance that there were many other mill sites in the neighbourhood. At the time it was mortgaged there were no settlements around it, or near it. The value of the land, taking the whole of the evidence into consideration, I take to have been then such that Mr. Sewall would not willingly have accepted it instead of the money. And I do not believe that people living in the district, and having better opportunities of judging, would have thought the purchase of the land at that sum a good investment of the money. There is, to be sure, against this opinion the evidence of Mr. Covell, who says that he passed through or near this land in 1798; and that he was so struck with the situation, that even then, when there was no one living near it, he thought in his own mind at that time, that it was worth 10,000*l.* The whole annual revenue of the province, I should think, did not amount at that time to 10,000*l.*; and I have no doubt it is true, as was affirmed on the argument, that the whole township of Elmsley, containing more than 60,000 acres, of which these 400 acres are part, could have been bought then for much less money. The whole account given by witnesses on both sides, of what took place twenty years after the time Mr. Covell speaks of, when the land was offered for sale, and actually sold, and when the country must have contained more than five times as many inhabitants, is sufficient proof that this witness's notion of value is quite visionary, if what can be got for a property is to be taken for a test of its worth. The evidence of what adjoining properties have been sold for between 1810 and the time of filing this bill, is also convincing upon that point. Mr. Smith, it appears, was quite willing to take one-tenth part of what Mr. Covell says was its value in 1798, twenty-five years afterwards, though he had in the meantime put up a saw-mill upon it; and it was because he could not get that, and would not take less, that the property was lost to him.

The mortgage money was to have been paid on the 3rd August, 1811. It was not paid then; nor is it shewn, nor I



think pretended, that either Mr. Smyth or the present respondents, or any one on their behalf, ever paid or offered to pay, any part of the principal or interest, from that time to the filing of this bill.

In 1819, eight years after the debt should have been paid, judgment was entered at the suit of Sewall, against Smyth the mortgagor ; I suppose for the amount then due on the mortgage, as no other debt is spoken of. If the object of entering that judgment was to enforce the payment of the debt by compelling in any way a sale of the lands, (a proceeding which both parties might then have thought open to them,) the judgment was not acted upon in a manner that shewed any keen desire on Mr. Sewall's part to get hold of the property, or that precluded Mr. Smyth from using at his leisure, whatever means were in his power for saving it from sale (if that were thought an object) ; for no execution against the lands was taken out upon it for about five years after it was entered. Mr. Jones, a respectable gentleman living in the neighbourhood of Mr. Smyth, was the agent of Mr. Sewall, to whom he could conveniently make any payments and propose any arrangements that he might desire. In order, as it would seem, to enable Mr. Jones to deal more conclusively and conveniently with the security, he took an assignment from Mr. Sewall, of the mortgage, for a nominal consideration. Judging from the face of the instrument and from the communications spoken of in the evidence as having afterwards taken place between Mr. Smyth and Mr. Sewall, I imagine that in taking the assignment, and in whatever was done by him subsequently, Mr. Jones merely acted on behalf of Mr. Sewall, who still in fact retained the security, and the entire control over it. By our law, there must be the delay of a year before land can be sold under a *fi. fa.* Mr. Smyth had that time therefore, at least given him to procure the money after his creditor had shewn his determination to enforce payment. It was as long a time as in the common course would have been allowed for foreclosure, if Sewall had had a court of equity to resort to ; and it is clear that Smyth had full knowledge of the intended proceeding. The land was brought to a public sale in August, 1825, under Sewall's writ, and was then sold *as Smyth's*, or, rather, all his right in it was sold, so far as the sheriff could sell it. He had no other interest in fact than his supposed equity of redemption. Whether Mr. Sewall, or his agent Mr. Jones, and Mr. Smyth, thought it could be thus effectually extinguished by the mortgagee purchasing it at a public sale, we cannot tell ; both parties acted at the time

as if they thought so. The result was, that Mr. Jones bid it off at 105*l*. The sheriff's deed makes no mention of the precise interest, nor of the incumbrance, but is in the usual form of sheriffs' deeds upon such sales.

If we can suppose a stranger coming to the sale and bidding off the land, without any explanation or knowledge of the facts, and being merely content to buy Smyth's interest, whatever it might be, then if the sale under a *fi. fa.* of an equity of redemption, could bind such an interest, the effect would have been, that he would have had the land with the incumbrance upon it; Sewall, nevertheless, would not have been restrained from pursuing his remedy against any other property of Smyth's for his debt. And if it had been afterwards thus paid, or paid voluntarily by Smyth, then the purchaser would have held the land discharged from the incumbrance so far as Sewall was concerned, but would be liable in equity, if not at law, to make good the sum to the person who paid it. On that point I refer to *Crofts v. Tritton*, 8 Taunton, 369. But here Mr. Sewall's agent was the buyer; he knew the particulars of the incumbrance; and if, on Sewall's account, he bid 105*l*. above that incumbrance, as the value of Smyth's interest, then the debt would be paid, because it formed part of his bid. If Mr. Jones had bought on his own account, he must, I should think, be necessarily regarded as bidding 105*l*. in addition to the debt and interest—and the sheriff should have seen that there was no misunderstanding on that point, but that the debt was paid (as being part of the price) before he closed the transaction by making a deed. How it was arranged, and what was in fact done, nowhere appears. Mr. Smyth is not shewn to have been in any way afterwards molested on account of the debt; and it is not pretended that he paid any part of it, at any time, in any other manner.

Some years before this sale, it seems, he had put up a small saw-mill on the lot, but made no improvement otherwise, unless the clearing one-eighth of an acre of the land can be called such. What beneficial use was made by him, or any one, of this saw-mill, is not stated in such a manner as can give any idea of its value. It seems to have been but little thought of, for it was suffered to fall into decay; and just before the sheriff's sale, Smyth, as if abandoning all idea of retaining the property, sent his sons to take out the saw-mill irons, which was done by carelessly cutting them out from the woodwork, as might have been done by any one who felt that he had no longer any interest in the mill, or that it was useless. Whatever may have been imagined by Smyth to have been the legal consequence of the public

sale of his interest, he does not seem to have been surprised by it, or to have complained of it. On the contrary, he went out of possession, as if that should follow of course; and then considered what he could do for still getting back the property during the period which it is admitted Mr. Jones still allowed him, and kindly allowed him as he acknowledged, if he could, through his relations or friends, make any arrangement for that purpose.

If being in a condition to redeem, or resolving to stand on any right of that kind, he had thought it necessary to contend for more than Mr. Sewall was willing to allow him, in the shape of indulgence, it was open to him to have retained the possession, notwithstanding the sale. Then the purchaser would have been driven to his ejection, and at any time while that was pending, and up to judgment, Smyth would have had the privilege, under the statute 7 Geo. II., ch. 20, which was well known and often acted upon here, of staying the proceedings, and procuring a re-conveyance, on payment of the debt and costs. Instead of this, however, he communicated amicably with Mr. Sewell, and found both him and Mr. Jones willing to act considerately, and to give him every chance of retaining or regaining the land, if he could do it, and thought it worth his while. What efforts he did make, we see ended in nothing. He could find no one who cared sufficiently about purchasing it, to take the trouble of perfecting an arrangement for that purpose, upon the easy terms of giving him any sum, from £25 to £100, beyond the debt and interest, which he was willing to take, payable at any time and in any manner. The reasons given for the failure are absurd, if we can suppose that the property was considered by any one to be a great bargain on such terms. One had lent his money, and did not like to ask for it back, thinking perhaps that it was better out at interest than applied to this purchase; another seemed at one time half willing, and then retracted; and some of these parties were connections of Mr. Smyth, having every motive and wish to serve him, as we may suppose, if they thought the matter of much consequence. What must we conclude would have been the situation of these parties, at this point of time, if there had been a court of equity in the province, affording ready means of foreclosure?

Though the sale on the execution is now held, and perhaps by lawyers was then known, to be an useless proceeding, it had at least the effect of shewing Mr. Smyth, that his creditor was determined to have the money by sale of the land; it was at least a manifestation of his desire to close the transaction, and a call upon Mr. Smyth, after many



years of indulgence, to act effectually ; and Mr. Smyth submitted to its supposed consequences, by yielding up the possession.

About this time a new aspect of things began to open. The British Government, in 1826 or 1827, were known to have resolved upon making the Rideau Canal, which now unites Lake Ontario with the River Ottawa, passing through the district in which these 400 acres lie, and along the waters which run through the whole township of Elmsley. It was a magnificent undertaking, and its construction occasioned an expenditure of more than a million of money. Though it could not be known how it would affect particular properties, situated along the waters, till the precise line was determined, the prospect of such a work of course excited attention and enquiry respecting property in the vicinity, and made it more saleable. Mr. Jones, who then held the conveyance from the sheriff, besides the transfer of Mr. Sewall's mortgage, had an offer made to him. It is clear on the evidence, that he had no desire either for Sewall or himself to be the gainer by the change of circumstances, which did not yet seem indeed to have operated very decidedly on the value of the land, for the offer was only £600, which would but little more than cover the debt and interest, to say nothing of the £105 bid on account of Smyth's supposed interest. Before Mr. Jones would accept it, he referred to Mr. Smyth : indeed the proposed purchaser was a friend and neighbour, and would have had nothing, as he declared, to do with the land, if Smyth, even at that time, could redeem it. Nothing effectual was done by Smyth, and the sale by Mr. Jones to Hicock and James Simpson, was concluded in July 1827, for £600.

Soon after, great public works were in progress at this section of the proposed canal. James Simpson was a contractor ; and being an active, zealous man, with capital at command, he opened roads from this point into the interior, which made this a central position : the public expenditure assisted the formation of a village ; there were some appearances that it would grow rapidly, and others were induced to embark money in purchasing portions of the property, till, after some transfers, it came, in 1832, into the hands of the appellants William Simpson and Ward, for a price paid by them of £5,000. Then they separated their interest, and both have been since selling village lots, and applying themselves in various ways to promote their own interests there, and the advancement of the village for their own sakes. Smyth lived till the close of 1831 ; his sons the respondents were, before that, grown up men, living in that country, and



acting for and representing their father. The Court of Chancery was established in 1837. This bill was filed in November, 1840. In the meantime, the evidence shews, that a village had grown up on these 400 acres. Churches have been built there; houses, shops, mills and manufactories, of various kinds; and complicated interests, as we must suppose, have sprung up. Looking, on the one side, at whatever Mr. Smyth or these respondents have done to keep their supposed interests alive—and, on the other, at what has been done by them by which it is stated to have been compromised, I do not think that this is a case in which a concern of such magnitude should be unsettled by allowing redemption.

It is true, there is no absolute bar by the lapse of time; for, under the facts of such a case, in England, time would have begun to run only when Smyth went out of possession, in 1825, I believe—fifteen or sixteen years before the bill was filed. It is true, too, that the deeds by which this property has been transferred from one to another, till it came to Simpson, do not on the face of them profess to convey an unqualified interest; and it is argued that that shews their knowledge of the mortgage. That they knew of it, there is no doubt, and of what had taken place after it. So far as that is material, there is no doubt about it. They probably knew all, or most of what we now know; but I should lay little stress on the form of these deeds—they all follow the form of that which the sheriff had given to Mr. Jones. Each would naturally convey the estate in no more absolute form than he received it; and the form of the sheriff's deed was not peculiar—it was such as is usually given upon all sales of land in execution. The sheriff only pretends to assign whatever interest the debtor may have. His deed was probably looked to here as the foundation of the title; and it was natural the subsequent deeds should conform to it. It was incumbent on each successive purchaser to consider, and enquire, and judge for himself. If they concluded—as I suppose they did when they were paying such large sums—that they might rely on Smyth not being allowed to disturb them by any court of equity, which might possibly be established after all that had occurred, I think they judged reasonably. And if they should be disturbed now, and there should be injustice in allowing it at this late day and under the particular circumstances before us, then I think, looking at the provision which the legislature has made in the 11th clause of the Chancery Act, we should be responsible for that injustice.

The decree does not contemplate saving W. Simpson and

Ward from the loss of their purchase money; and it could not save them from other losses, of which no account could be taken. They must be supposed to have disposed of what they have sold, and to have done what they have done, in a great measure with a view to improve the value of the remainder of the land, which this decree would take from them. I do not see how any decree could be framed that would place them in a just position, unless it can be held that they deserve to bear the losses I have stated, which, under the circumstances, I do not think they do. The decree, in other parts, is admitted to be such as cannot be supported and carried into effect; and I think it manifestly could not, in several points. It has been urged that we could model it as we pleased, under the extensive powers of the statute; that we could give compensation so full and particular as to embrace everything, though it is admitted that that might leave hardly a surplus of interest worthy of redeeming, or at least might make redemption impracticable. This would be acting somewhat on the same principle that the importation of certain goods is often prevented, by laying duties that amount to a prohibition: but I think it would be a much more proper and respectable course, to give the protection directly and effectually, by not allowing the position of the parties to be changed, where such injury and inconvenience must follow.

I do not consider that what James Simpson may have done in making roads, or anything of that kind, is connected with the case; for that was done by him as a contractor, for facilitating his work on the canal, in getting supplies, &c., and it was before he had an interest in this property. Neither do I think that the making the canal, so far as that has enhanced the value of the land, is an improvement in value, by anything that the mortgagee, under ordinary circumstances, could claim credit for. The mere water power does not seem to have been rendered better by the canal, but rather otherwise.

On the whole, I think, when there has been so much liberal indulgence on the one side, and so much indifference and want of exertion on the other—no direct offer to redeem till the bill filed—all the effort made to foreclose that was in the power of the other party—an apparent submission to the effect of that effort, by giving up possession—new and great interests sprung up under the view of these respondents and their ancestor, without remonstrance or attempt to check it—that we ought not now to let these respondents in to redeem because they represent an interest which their devisor, while he held it, was willing to part with for 20*l.* or 30*l.*, and could get no one to give him that for it.

I do not ascribe a decisive effect to the sale under execution alone ; if that was all that could be shewn, it should depend on other circumstances whether it should have any weight or none. Nor do I consider the great rise of value, under the facts proved, to be an advantage of which the mortgagee is entitled, as of course, to reap the benefit. I look at all the circumstances—the claim to redeem—the difficulty of redeeming—the conduct of the parties—the rights and interests and convenience of others—perhaps, even in some sense, the public convenience—the hopes that opening the title under such circumstances might give to others, who now more justly allow matters to repose as they are—I would not attempt to lay down any inflexible principles for acting on the discretionary power given by the act. It would be particularly unwise to do so. Each case must be looked at with all its attendant circumstances ; no one of which, if it stood alone, might be a reasonable ground for withholding redemption, though all, together, may afford reasons irresistible. The exercise of a large discretionary authority of this kind is the most irksome department of judicial duty. No court could desire to be intrusted with it ; but I think the legislature would have acted inconsiderately if they had not, under the peculiar circumstances, committed it to some quarter ; and I do not know where it could have been more properly vested than in the court of Chancery, with the power of appealing to the judicial committee of the Privy Council.

When I said that I think we should be careful not to attempt to limit the exercise of the discretionary power given by the 11th clause by any inflexible rules, I had it nevertheless in my mind, that there is one principle which it would seem reasonable to lay down as a general rule, to be observed in acting upon that clause ; namely, that one of the two parties to a mortgage should not be suffered to gain a positive advantage to himself greatly at the expense of the others merely from the absence of an equitable jurisdiction ; which advantage it may appear clearly he would not have had, if there had been such a jurisdiction established. Now here, on the side of the mortgagee, it seems evident that, if there had been a court of equity open from 1811 to 1827, he or his assignee never would have allowed Mr. Symth to keep his equity of redemption open. They gave by their conduct, every evidence that they would not ; they did as much as they could towards foreclosing ; and after what was in fact done, it would be unreasonable to suppose that, if Mr. Jones or Hicock, or Simpson and Ward, had had the opportunity of going to a court of equity for that purpose, they would have acted as they did, without foreclosing ; they would surely not



have left it in Mr. Smyth's power to file in effect a bill to redeem against a whole village, subjecting themselves to ruinous losses and to disappointments that might be irreparable.

On the other hand, what is there in the evidence to shew that, if there had been a court of equity open in this province from 1811 to this moment, the opportunities of Mr. Smyth to preserve his estate would have been better than they were under the circumstances that existed? It is clear that, for nearly sixteen years after the default in paying the debt, redemption would have been gladly allowed at any time by the voluntary act of the mortgagee, and without the aid of any court: and though soon after that time the circumstances of the property came to be very materially changed, yet neither Mr. Smyth, nor the respondents after his death, ever put it to the proof whether they could have obtained without a court of equity, whatever such a court could have given them. They never went forward and offered to pay their debt, and have not shewn that they were ever able to do so; and when they saw these defendants and their vendors expending their labour and money, and wearing out their lives and means in using the property as their own, they never took the decided step of checking them in the course they were pursuing, by declaring a determination to apply for redemption, till in November, 1840, they filed their bill, thirty years after the land had been mortgaged, and, as I think, for its value.

These being the facts, my opinion is, that the decree for redemption should be reversed, and the bill dismissed.

MACAULAY, HON. J. B., Ex. C.—It is my misfortune to differ from the learned Chief Justice in one point; and whenever I am so unfortunate, I differ with great regret, humility, and distrust of my own judgment. My excuse is, that while I sit here it is my duty to form an opinion; and that, whatever that opinion may be, the parties are entitled to the benefit of it, and that it is incumbent on me to give them that benefit.

As relates to the appellants—adverse to whom my opinion on that point is formed—I feel and confess the whole responsibility of such opinion to be my own; for, if learning, ability, research and able argument, could have guided my mind to a different conclusion, they have had the full benefit thereof.

The first point is the effect of the sale by the sheriff of Johnstown, upon the equity of redemption. The ordinary style of writs of *fiery facias* against lands, commands the sheriff to levy the amount “of the lands and tenements” of the debtor; and it does not appear that the language of the one referred to in this case was otherwise worded. It was



admitted in the argument, that the terms of the 5th Geo. II., chap. 7, namely, "houses, lands, and other hereditaments and real estate," were comprehensive enough to embrace equitable interests; and that the word "*lands*" may include an equity of redemption. Assuming this to be so, the writ authorised in effect the sale of such an interest, if it could be disposed of under such an execution by a court of law. The sheriff's deed does not restrict the sale to the equity of redemption; it makes no allusion to any mortgage or incumbrance; it recites the seizure of the two lots of land in question, and then conveys all the right, title, interest, property, claim and demand of the debtor (Thomas Smyth) therein. The deed is, therefore, also, comprehensive enough to include the equity of redemption, if saleable. Whether it formed the express subject of sale, or whether Mr. Charles Jones bid 105*l.* as for the whole premises, or merely for the equity of redemption; and whether the sum of 105*l.* was ever paid by him to the sheriff or to Smyth, as a surplus above the mortgage debt; or whether it was retained by him, and applied in reduction only of the mortgage, leaving the balance still due by Smyth, does not appear. The sheriff's deed acknowledges the payment, as for all Smyth's interest, and no more is said on the subject. As to the real fact, there is no proof that the 105*l.*, or any part of it, was paid, or treated otherwise than as a credit of so much in Smyth's favour, upon the judgment or mortgage debt. The object of the sale no doubt was, to take from Smyth all remaining interest, and to transfer it to the purchaser; and, could it have such effect, the equitable interest uniting with the legal estate already in Mr. Jones, the estate would have become absolute in him.

The effect of this sheriff's sale is a question that properly arises in a court of equity; there being no legal estate to sell, if anything passed it must have been an equitable interest; for I do not think that, by any construction, the legal estate can be held to be embraced by reason of an implied assent of the mortgagee, that the whole estate, legal and equitable, should be sold. The sheriff could not shift the legal estate; that could only be done by the mortgagee himself, or his assignee.

Many arguments were urged for and against the efficiency of the sheriff's sale to pass the equity of redemption; and doubtless such an effect has been allowed to writs of *fi. fa.* in other countries, where the statute 5 Geo. II. chap. 7, was in operation. But the cases cited seem to have determined against it. In *Burden v. Kennedy*, 3 Atk. 739, the Lord Chancellor says "In the present case there is only an equity

“of redemption in the debtor in the leasehold estate; and an “*execution lodged* will not affect this, as the legal estate is “in the mortgagee.” (a)

I cannot satisfactorily distinguish between those cases applied to equities of redemption in leasehold estates, and the present. They apply in principle. One reason why an execution at law cannot attach upon such an interest is, that it constitutes equitable assets. If liable to be disposed of under a *fi. fa.* during the lifetime of the mortgagor, it would be assets after his death, and as such be disposable in like manner. But, being equitable assets, it is only properly administered in a court of equity, and distributable as equitable assets upon a different principle than that which applies to legal assets. Furthermore, upon a plea of *plene administravit* and issue, the executor or administrator is entitled to a verdict, upon proof of the due administration of the legal assets; and it would be no answer that there were equitable assets; for, as to them, the creditor might not be entitled to the same priority. I consider the sheriff's sale, therefore, inoperative; and, if so, nothing passed; and, it being void, the equity of redemption remained where it was before. If the sale had no effect upon such equity, no equitable right could accrue to the purchaser under it. It remains, therefore, only as a circumstance in the case which influenced the acts and conduct of the parties, under a mistaken supposition that it had, or might be afterwards decided to have had, an effect on the estate, which, it now turns out, it had not. It is therefore, as respects any equitable considerations, merely a circumstance influencing both parties—the mortgagor and the assignee of the mortgagee—under a misapprehension of its real effects upon their respective rights.

As regards the demurrer for want of parties I concur fully in what has fallen from his Lordship the Chief Justice.

It is next to be considered whether by law the respondents are estopped from redeeming, owing to lapse of time, acquiescence or otherwise, apart from the 7th Will. IV., ch. 2, s. 11; and if not, then, whether that clause vests in the court a wider discretion, under which they may be precluded.

The 11th section of the Chancery Act is to be construed in the abstract, and the powers it confers determined, without regard to any particular case; and I shall first consider it. The argument of inconvenience was strongly urged in favour of a strict construction, in extension of its provisions, against as well as in favour of relief; but, admitting the

(a) *Lyster v. Dolland*, 3 Bro. C. C. 478; *Scott v. Scholey*, 8 East, 466; *Metcalf v. Scholey*, 2 N. R. 461; *Doe Webster v. Fitzgerald*, Q. B., U. C.

force of such arguments, it is to be remembered we are to expound, not make, a law; and that, whatever discretion is vested in us by law, is a judicial discretion, to be interpreted and exercised according to established rules and principles of construction, and in subservience to the rights and interests of the litigant parties for whom a right, legal or equitable, is *prima facie* established—the onus of subverting it is upon the opposite side, and the power to overturn it is to be cautiously exercised.

An equity of redemption is in equity regarded as the estate itself, and the mortgage thereof a pledge only, and the law of England in relation to mortgages is, in connection with our statute law on the same subject, to be borne in mind, and, when referred to, both will be found to display a solicitude (I might almost say unreasonable) in favour of mortgagors. I am myself friendly to the statutes of repose; as a legislator, I would, if anything, have made them more stringent than they are in favour of quieting possessions; and, among other things, I would, in passing the Chancery Act, have had no scruples in giving effect to all sheriff's sales under circumstances like the present—subject to exception in peculiar cases, in the discretion of the court—making the want of effect in such sales the exception, instead of leaving it universal, as it now is; and I so intimated, I think, in my answers to a series of questions put to me by a committee of the Legislative Council, when the Chancery Act was under consideration.

The value of real estate in Upper Canada in by gone years, compared with its value in more recent periods, and a knowledge of the large extent to which it has been made an article of commerce, as it were, and the loose and careless way in which in times past sales have been completed, and imperfect titles ignorantly accepted, and other considerations, press strongly in favour of liberal legislative provisions to confirm titles taken *bona fide* for value, and supposed to be valid. It is, however, the province of the legislature, and not of the courts of justice, whose rules of decision are prescribed.

In endeavoring to interpret the 11th section of 7 Will. IV. ch. 2, I have tried to analyze it, by separating that which relates to mortgagors from what relates to mortgagees. This I think a correct course, and well calculated to present a clear view of the several portions applicable to each respectively. Had the provisions of this clause been divided by the legislature into two distinct sections, they would be construed together; and I do not perceive that they would have less force, so separated, in relation to each other, than they have, blended as they are in one clause. Before reading this clause, I would refer to the state of the law at the time it was adopted, and



to the rules by which statutes are to be construed; some of which, not inapplicable, are mentioned by me in the case of *Gardner v. Gardner*, cited in the argument.

In addition to the law of England, the statute law of this province, on the 4th of March, 1837, was to the following effect:—

By 31 Geo. III. ch. 31, sec. 43, “All lands granted in “Upper Canada shall be granted in free and common soccage, in like manner as lands are holden in England in free “and common soccage.”

32 Geo. III. ch. 1, sec. 3, directs that “In all matters of “controversy relative to property and civil rights, resort “shall be had to the law of England, as the rule for the decision of the same;” and, by

7 Will. IV. ch. 2, sec. 2, the Court of Chancery is given jurisdiction in all matters relating to mortgages.

Sec. 6.—“The rules of decision shall be the same as govern “the Court of Chancery in England.”

Statute 4 Will. IV. ch. 1, sec. 16, enacts that “No person “shall make entry or bring an action for lands, but within “twenty years next after the time at which the right to “make such entry, or to bring such action, first accrued.”

Sec. 17, mainly *upon conditions* broken.

Sec. 19.—“In cases of tenants at will, the right shall be “deemed to have accrued at the determination of such “tenancy, or at the end of one year after the commencement of “such tenancy; *provided*, no *mortgagor* shall be deemed to “be a tenant at will, within this clause, to his mortgagee.”

Sec. 32.—No person claiming any land in equity shall “bring any suit to recover the same, but within the period “during which, by the provisions of this act, he might have “made entry or brought an action to recover the same, if he “had been entitled at law to such estate, interest or right, in “or to the same, as he shall claim therein in equity.”

Sec. 35.—“Nothing in this act to interfere with any rule “or jurisdiction of courts of equity, in refusing relief, on the “ground of *acquiescence* or *otherwise*, to any person whose “right to bring a suit may not be barred by virtue of this act.”

Sec. 36.—“When a mortgagee shall have obtained possession of the land, the mortgagor, shall not bring a suit to “redeem, but within twenty years next after the time at “which the mortgagor obtained such possession, unless in the “meantime the right be acknowledged in writing.”

Sec. 43.—“No action, or *other proceeding*, shall be brought “to recover any sum of *money secured by any mortgage*, judgment, lien or otherwise, charged upon, or payable out of “any land, *at law* or *in equity*, but within twenty years next



“after the present right to recover the same shall have accrued,” &c., unless part paid or acknowledged, &c. “Provided, that in respect to persons now entitled to an equity of redemption, the right to bring such action, or to pursue a remedy for the same, shall not be deemed to be extinguished or barred by lapse of time, until the expiration of five years from the time that an equitable jurisdiction shall be established—provided that shall happen within ten years.”

4 Will. IV. chap. 16, makes a certificate of redemption equivalent to a re-conveyance; “provided that such certificate, if given after the expiration of the period within which the mortgagor had a right in equity to redeem, shall not have the effect of defeating any title, other than a title remaining vested in the mortgagee, his heirs, executors or administrators.”

Such being the state of the law, the eleventh section of 7 Will. IV. ch. 2, recites that the law of England was at an early period introduced into this province, and had continued to be the rule of decision; and at the same time, from want of an equitable jurisdiction,—

it has not been in the power of *mortgagees* to *foreclose*.

*mortgagors*, being out of possession, have been unable to avail themselves of their equity of redemption.

And, in consequence of the want of these remedies (or this remedy)

their rights may be found to be attended with peculiar equitable considerations, in regard to compensation for improvements,

their rights may be found to be attended with peculiar equitable considerations, in respect to the right to redeem,

Depending upon the circumstances of each case; and a strict application of the rules established in England might be attended with injustice; “*Be it therefore enacted*, that the vice-chancellor of the said court shall have power and authority, in all cases of mortgages become absolute at law, before the (4th day of March, 1837,) by failure of performance of the condition to make such order and decree,

in respect to foreclosure, and with regard to compensation for improvements, and generally with respect to the *rights and claims of the mortgagee*,

in respect to *redemption and* generally with respect to the rights and claims of the *mortgagor*.

“as may appear just and reasonable, under all the circumstances of the case.”

The first part of the recital states merely two facts, but the mode of expression is peculiar, and indicates the inducement to the enactment which follows, it states that it had not been in the power of mortgagees to foreclose, and that mortgagors out of possession had not been able to avail themselves of their equity of redemption; and as a consequence of the want of these remedies, that *their rights* (that is, to foreclose or redeem) might be attended with peculiar equitable considerations in respect to compensation for improvements and in respect to the right to redeem. So far as the recital is a key to the interpretation of a statute, the present shews very plainly in what respects it was apprehended peculiar equitable considerations might arise—namely in relation to mortgagees claiming for improvements, on the one hand, and mortgagors seeking redemption, on the other. It then adds, that a strict application of the rules established in England, might be attended with injustice. This implies that the injustice was to be apprehended from the strict application of the law of England; but the time, so far as the mere lapse of time is concerned, within which foreclosure or redemption could be obtained, was and is regulated by the provincial statute 4 Will. IV., ch. 1, and not by the rules established in England; and I do not see that this eleventh section overrides that act, so as to empower the court to dispense with or alter its provisions; in other words, to refuse foreclosure or redemption within twenty years after the time shall have commenced running, merely by reason of the lapse of time; whether therefore a mortgagor or mortgagee pursues his remedy in due time, is to be decided by a reference to the above-mentioned statute (*a*). The 35th section of that statute, however, enacts, that it shall not interfere with any rule or jurisdiction of courts of equity, in refusing relief on the ground of acquiescence or otherwise. Taking then the rule of acquiescence, it would seem clear that, in relation thereto, the rule in England may be relaxed, so as to admit a mortgagor to redeem, although strictly precluded on that ground. The question of difficulty is, whether, if entitled to redeem, notwithstanding the strict application of the rules in England, a *stricter* rule can be applied to prevent it? and, generally; whether either party, being entitled to foreclose or redeem by the strict application of the rules established in England, such right can be curtailed by the application of a stricter rule? The argument is, that relaxation in favour of one party, must have a contrary effect as against the other, and

(*a*) In the event of the time having expired, a question might arise whether under the equity of sec. 11, it could be opened and relief granted, although the statute 4 Will., IV., c. 1, would otherwise have operated as a bar.

that in relation to acquiescence, facts and circumstances falling short of it by the rule in England, may be held to amount to it here, to prevent a redemption within the twenty years allowed by the statute 4 Will. IV., ch. 1, and in like manner in relation to any other rule in England, that it may be extended in favour of, or restricted against either party, as may appear just and reasonable.

The ulterior view is, that this clause intended that the court should not be restricted to the rules in England at all, but that occasional exceptions might be made, or a new rule *pro hac vice* be adopted in granting or refusing relief, under circumstances in which, by the rules established in England, applied strictly or even liberally, it would not be warranted; in short, that each case may be disposed of according to its own merits, as may appear just and reasonable, without regard to the nature of the relief sought, or to the rules established in England.

To a certain extent I can perceive a discretion vested in the courts here, to expand or modify the rules which govern the Courts in England, in favour of the rights and claims of mortgagor and mortgagee, but the limits in that discretion are not clear. It is contended, it may extend to *abridge* the rights of either party, as well as to extend them, by granting or refusing relief on broader or narrower grounds than in England: whether it be so, depends upon the spirit and meaning of the section in question. Being a remedial clause it is to be construed liberally; but in what respect is it remedial? It is so, in regard to either party that may require its aid. It may favour the mortgagee in respect to foreclosure, to compensation for improvements, and generally with respect to his rights and claims. It may favour the mortgagor in respect to redemption, and generally with respect to his rights and claims; and where one is favoured, it must necessarily be at the expense of the other. The extent and nature of such favour is the point of doubt. It is no favour to apply a stricter rule against the party seeking relief, than would be authorised in England: it converts a remedial into an irremedial act; it is not a benign, but a rigid and forced application of it. It is extending a favour to the opposite party, subversive of the right to the relief sought, and incompatible with an equal respect to the rights of both. A mortgagee seeking foreclosure, or any other relief, may not be entitled to what he asks, according to the strict rule: in such an event, the rule may be relaxed in his favour. A mortgagor, seeking redemption, may require a similar indulgence. Here each party in turn may experience an ameliorative application of the rules in England. It is the reverse of this to refuse the



relief by a more stringent application of the rules of equity not to unbend them in favour of the party requiring relief, but to tighten them against him to his prejudice; to say to a mortgagee, you are clearly entitled to foreclosure by the English rules, but it would be unjust towards the mortgagor to allow it upon any terms, and it is refused; or to say to a mortgagor, you are clearly entitled to redeem by those rules, but it would be unjust towards the mortgagee to allow it on any terms, and it is refused—is to apply a stricter, not a more benign rule than prevails in England. Is it making a just and reasonable decree in respect to *foreclosure*, or generally with respect to the rights and claims of the mortgagee, to refuse foreclosure on any terms, where he is, by the rules of England, clearly entitled to it?

Is it making a just and reasonable decree, in respect to redemption, or generally with respect to the rights and claims of the *mortgagor*, to refuse redemption on any terms, when, by the rules in England, he is clearly entitled to it? How can a rule be just and reasonable here, which is more rigid than the rule established in England, the strict application of which it was apprehended, might be attended with injustice?

The appellants contend for a shifting application of this clause, so as to grant or refuse foreclosure, not according to the rights and claims of the mortgagee when seeking relief, but of the mortgagor, and *vice versa*. Now foreclosure, when the mortgagee is entitled to it by the rules in England, must be consistent with the *rights* of the *mortgagor*. So, *e contra*, redemption, when the mortgagor is entitled to it by the same rules, must be consistent with the *rights* of the *mortgagee*; so that the mortgagor can have no *right* to a decree against foreclosure to which the mortgagee is entitled; nor can the mortgagee have any *right* to a decree against redemption, when the mortgagor is entitled to it. If this be a correct view, then it depends upon the *claims* of the parties; and surely a mortgagor could not *claim* to have foreclosure refused, or the mortgagee claim a refusal of redemption, if clearly the *right* of the *party* seeking the relief. Consistently with these rights there may well exist *claims* on the other side for favorable consideration, to be granted in subservience to such right; but to allow a claim falling short of a bar to the right, to operate as a bar to it, looks like usurping a discretion, and frustrating the remedial objects of the legislature, which did not mean to take away existing rights, but only to subject them to conditions or terms inadmissible by the strict rules established in England.

The clause [section 11] empowers the court to make such order or decree, in respect to foreclosure, as may appear just



and reasonable, having regard to the *rights* and *claims* of the *mortgagor*. Is it just and reasonable to refuse it when the right of the mortgagee is clear, whatever may be the *claims*, falling short of a bar to that right, but subordinate to it, of the mortgagor? So, as respects the mortgagee, it is just and reasonable to refuse redemption, when the right thereto is clear, whatever may be the *claims*, short of a bar to that right, but subordinate to it, of the mortgagee? If, by the rules established in England, the mortgagee is entitled to foreclosure, or the mortgagor to *redeem*, what *rights* or *claims* can exist on the other side, that shall extinguish such right? When two opposing rights are advanced, one must predominate; and when it is decided which, the antagonist claim ceases to be a right, though it may remain an equitable claim.

The right to foreclose or redeem, by the law of England cannot be repelled or destroyed, however modified, unless a countervailing *right* of paramount weight be established; but the argument is, that such right may be destroyed by that which falls short of a paramount right by the same rule. Of course, a mortgagee or mortgagor seeking relief, must establish a *right* to foreclose or redeem, in the first instance, by the rules of England; if they *fail* him, he may obtain assistance from the clause in question, when proper to grant it; but, if he does not *require* its aid, can facts and circumstances, which in England could at best constitute equitable claims only, and not amount to a bar, be admitted to ascend beyond mere claims here and mount up to a bar, so as to reverse that which, by the rule there, would be the right of the party, and convert it into the right of his opponent; would that be just and reasonable, when it is said as an inducement to the enactment, that a strict application of the rules in England might be attended with injustice? If these rules are exceeded or straitened, does it not become still more unjust?

Such, after the best attention I can give it, I must say is my humble impression of this 11th section. Its provisions run *pari passu* equally in favour of both parties; the want of a court of equity being no fault of either, and each being liable to be affected or prejudiced owing to its absence; and it reserves to the court about to be established a discretion to relax the rules (by which it must, under the 6th section, have been otherwise governed) in favour of either party, when deemed reasonable and just under all the circumstances; but do not limit their rights within narrower bounds by refusing foreclosure or redemption, where by law the party was entitled thereto.

In my view of the present case, therefore, it turns upon the question, whether the respondents have a right to redeem by the rules established in England? In applying attention, with this view, more closely to the case before us, it is to be observed that Thomas Smyth executed the mortgage in fee in 1810, which became forfeited for conditions broken in 1811. When this security was taken (each party being presumed to know the law), both knew that in equity it only operated as a pledge, and that the mortgagor would have the equity of redemption for twenty years after default. It was also known to them that there was no court of equity, in which the one could foreclose or the other redeem; but it was open to the mortgagee to eject the mortgagor, or to proceed on collateral securities; it was open to the mortgagor to tender the debt and interest, or to resist an ejectment, under the statute 7 Geo. II. chap. 20. There were, therefore, other remedies open, but not the opportunity to foreclose or redeem.

The mortgagee did not eject the mortgagor, and he remained in possession. In 1818 the mortgagee proceeded to judgment on a collateral security; and, in 1825, the sheriff's sale was made ostensibly of the two lots of land now in controversy. The mortgage had been, shortly before such sale, assigned for a nominal consideration to Mr. Charles Jones, as a trustee, it is said, for the mortgagee; and, in such assignment, the right to redeem is distinctly stated. Mr. Jones, soon after the assignment, bought the land at such sheriff's sale for 105*l.* being at the time possessed of the legal estate as assignee of the mortgagee. That this sum of 105*l.* was ever paid or tendered to the sheriff, or the mortgagor, does not appear; and, in the absence of proof, it may as reasonably be inferred, it was retained or applied in reduction of the mortgage debt, but inconsistently so applied, if the mortgagee had really purchased the equity of redemption, for that would involve the obligation to satisfy his own mortgage independently.

In 1825 the mortgagor relinquished possession, and in 1826 Jones entered. At this period, and not before, the time for redemption began to run against the mortgagor; up to that time things remained in *statu quo*, and in effect it was the same as if the condition had been broken in 1825, instead of 1811. The fourteen year's delay, from 1811 to 1825, was an indulgence or a forbearance on the part of the mortgagee, who might not have been willing to enter and incur the responsibility of a mortgagee in possession, or to forego his unclogged right to proceed on other securities.

Now, taking it to be clear that the time for redemption did not begin to run against Smyth till 1826, when Jones took

possession, and that he had till 1846 to redeem, the real question is, whether that right was lost in November, 1840, at the end of fourteen years (when the bill to redeem was filed), either by the rules established in England, or under the 11th section of the Chancery Act. I do take it to be undisputed, that the *time* for redemption did not begin to run against the mortgagor, until the assignee of the mortgagee took possession, in 1826, although fifteen years after the condition had been broken. And my opinion is governed by this consideration; for, if I were justified in giving it relation to an earlier date, I should be quite disposed to do so.

Assuming then, that the right of redemption existed, and that the time of limitation had not commenced running against the mortgagor till 1826 I do not find authority for holding that right lost by reason of acquiescence or otherwise between that period and 1840, when the bill to redeem was filed. As to mere lapse of *time*, the respondents had until now, (1846) to file their bill, and had the time by reason of long possession by the mortgagee, been nearly expired before the year 1834, the statute 4 Wm. IV., c. 1, would have extended it for five years after the Chancery Act was passed, namely till 4th March, 1842.

It cannot depend upon mere value, or the consideration how far the mortgagee's debt was an equivalent for the lands at their value in 1826, when the time first began to run. Much stress has been laid upon the value, and as far as material, I look upon the lands mortgaged to have been then worth at least as much as Mr. Jones sold them for—if any thing, more; and it is clear that they rose in value very rapidly afterwards. I do not think acquiescence proved, on the part of the mortgagor or the respondents, or that they slumbered on their rights to a degree amounting to an abandonment in a court of equity. In 1825, the mortgagor relinquished possession on the eve of the sheriff's sale; up to that time his rights as a mortgagor subsisted, and were clearly recognized by the mortgagee in his assignment to Mr. C. Jones; I think he removed the mill irons—which was the only abandonment of possession proved—in the mistaken supposition that the sheriff's sale would operate to foreclose him, and that all right of redemption would be thereby extinguished; therefore, that though he so relinquished the possession voluntarily in one sense, still it was evidently owing to a mistake in law as to his true rights. It is not shewn that he delivered possession, or gave any express assent to the mortgagee's entry in 1826. He knew the possession could be recovered by an ejectment, and appears to have submitted to circumstances he could not avert



and which he ignorantly looked upon as putting an end to his equitable rights. If it be said he must be supposed to have known his legal rights, knowing all the facts, the answer is, so must the other party ; but both were in error, and it is obvious he did not spontaneously relinquish or part with any right he really thought he had the power to retain. I do not feel justified in holding what he did under the circumstances, an acquiescence that should bind his rights ; nor according to the evidence, did Mr. Sewall the mortgagee ; for it appears that afterwards, and when purchasers first offered in 1826, the opportunity of redeeming the estate was generously and liberally offered to the mortgagor ; and it is shewn that he at that period made fruitless efforts to raise the money, or to induce friends to purchase at a small advance, manifesting an anxiety to turn the property to better account, and to realize something more from it. In this he could not succeed, and he was himself poor, and without the means of extricating the land.

I do not think any one perusing those portions of the appellants' answers, and the evidence on the defence read at the hearing, can rise from the perusal with the impression that the mortgagor voluntarily resigned his rights, or did more than submit to what he could not evade ; he was evidently influenced by the pressure of the sheriff's sale. The only fair application that can be now made of that proceeding is, that it induced the erroneous belief in Mr. Jones and those holding under him, that it might enable them to transfer or enjoy the absolute estate in fee, in law and equity ; and to shew that when Jones entered and sold to Hicock, and he to Ward and James Simpson, and they to the appellants, each professed to sell and expected to buy an indefeasible estate, and thenceforward used, occupied, improved and disposed of, the premises as absolute owners.

In relation to this sale, both parties laboured under mistaken notions as to its effect ; and if in itself void and inoperative, the mortgagor's so far yielding to it as to dismantle his mill, fearing he would otherwise through its means lose the irons, did not, in my idea of the rules of equity, manifest that deliberate surrender of his rights which should for ever conclude him. If I thought it ought, I would cheerfully give it that effect in favour of the parties who have possessed and enjoyed under that sale, in the belief, that though doubtful, it would ultimately be upheld as valid and binding on the rights of all parties concerned. Nor do I consider the right barred by passive acquiescence after the entry of the mortgagee's assignee.

The appellants' evidence, as read, shews, that from the



beginning it was looked upon as a doubtful title. In 1826, Mr. Jones held clearly as mortgagee, except in so far as the sheriff's sale might strengthen his title. This, Hicock, Ward and the Simpsons knew, as shewn by the admission of the defendants, in their answers as read. It appears that Mr. Ward's offer to purchase was deferred till the mortgagor had the previous opportunity to redeem, thus treating it, to a certain extent, as a mortgage still. He did not join in the conveyance, nor was he asked to release his right. Mr. Jones only conveyed the right, title and interest that he had—so did each subsequent party in succession—exhibiting on the face of the deeds or assignments a distrust of the title; or, at all events, a prudent avoidance of guaranteeing any more perfect title than they had. This may have been induced solely by reason of its being a title derived under the sheriff; it was most probably also owing to the nature of the title as a mortgaged estate. It was, however, a safe course of dealing.

When possession was first taken, in 1826, the premises were unimproved. In 1827, they were conveyed by Mr. Jones to Hicock. In that year, or the following, the Rideau Canal was undertaken. The Rideau Canal Act was passed the 17th day of February, 1827 (a); at this period, Mr. Ward had made some small improvements, when Mr. James Simpson came there as a canal contractor, and became jointly interested in the premises. In 1828 or 1829, lots for a village were laid off, and the parties in possession treated the property as their own. In or about 1830, one of the respondents attended the sale for taxes, and shewed thereby that the mortgagor had not entirely abandoned all claim; for Terrence Smyth then told James Simpson, the then possessor and competitor at the sale, that he attended to please his father, who was in his dotage; adding that he never expected to get the property, and that they had had the privilege of redeeming for a long time, &c.

This shews two things—namely, that the mortgagor was old and infirm (it is clear he was also poor), and that he still directed his attention to these lands. In 1832, he died. In that same year, William Simpson, for the first time, became interested; and his answer as read at the hearing shews the then state of the improvements. He admits knowledge of the nature of the title; and Mathieson in his evidence says, that in 1833 one of the respondents told him he still claimed the property. In 1835, overtures to compromise were made by the respondents.

In 1836, an ejectment was brought (a step that must have

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(a) See Provincial Statute, 8 Geo. IV., c. 1.

been a hopeless effort to regain possession), and in 1837, the Chancery Act was passed. Up to this time it does not appear, that any offer of the mortgage-money and interest, or to redeem, was made; the only overtures or efforts seem to have been to obtain something in addition to the mortgage debt; and had the £105 bid by Mr. Jones at the sheriff's sale, been tendered to the mortgagor in 1825, it is probable he would have accepted it and released his right, or at all events have thereby committed an unequivocal act of acquiescence and approval; but it was not done. The mortgagor in his life-time, and the respondents after his death, may have been unable to redeem at an earlier date; but the property, soon after possession was taken by the assignee of the mortgagee, began to rise in value; and had it remained unimproved, its increasing value alone would have enabled the respondents to raise money upon it, and redeem the property within the twenty years; that, I think, is quite plain on the evidence. Had the money been tendered after 1826, it would have been a useless proceeding, for it is quite obvious that it would not have been accepted.

In 1837, every impediment to foreclosure or redemption ceased. The appellants did not seek to foreclose, wishing to consider the mortgagor as foreclosed already. The respondents sought to redeem in 1840, fourteen years after possession was taken by the mortgagees. In this (I mean not filing the bill sooner), I see no delay that should conclude them; especially when the events of 1837 and 1838, and the state of the country in 1838 and 1839, are remembered. There is much, I think, (according to English authorities) to preclude redemption as against the purchasers of village lots, especially Shaw and others, acting in confidence of what Terrence Smyth said in his letter of 10th May, 1832. That letter, however, was I think, written bona fide, and stated clearly the claims of the mortgagor to the property, and gave Shaw distinct notice thereof. His opinion as to what his father, then in his dotage, would do, was verified by the event. He does not disclaim as for himself, in the event of his acquiring any right after his father's death; and, if he had, a *nude* assurance of the kind, by an expectant heir or devisee, would not at law, bind him; and, I apprehend, would not, without more, estop him in equity. It did not influence Messrs. Ward and Simpson in their purchases; and, as to others, whom it may assist in protecting in their possessions, the respondents offered on the argument, through their counsel, to forego proceedings against them, and to confirm their titles.

In addition to the sheriff's sale, and the rights it was supposed to have conferred, and the acts of acquiescence and

the passiveness of the mortgagor and his devisees, the appellants rely upon an equity arising out of their energy and labour and large expenditure upon the premises, and their foresight and judgment in promoting a village, to which the principal part of their enhanced value is by them attributed; also, the long time they have been in possession, spending the best years of their lives in improving a property they supposed to be their own, and making by laudable industry a provision for themselves and families. No doubt much is due to their enterprise, exertions and improvements, in raising the value; but claims like these cannot, I apprehend, be suffered to deprive others of their rights, and to change the rights of property; were it a case at law, there would be no doubt. After the respondents had established a clear legal right, it would be vain for the appellants to set up fourteen years' possession and large improvements as a defence; and if the equity of redemption be really looked upon in equity as the title to the property—if the equitable estate is regarded in equity in the same light, as the legal estate at law,—the same consequence would seem to follow. It would, too, were it a legal title, be open to the appellants to set up at law the defence of acquiescence, &c., though perhaps with less effect than in a court of equity. The prospect of the appellants losing the hold they have so long had and enjoyed, in the confidence that their title was a secure one, no doubt addresses itself strongly to one's sympathies; these things render the duty of deciding painful and anxious. But we must look to the rights of the other side, and in the conflict of opposing claims, determine with firm indifference where the legal right is, and acknowledge it. It is the business of legislation to cure doubtful titles, by general remedial provisions; the courts cannot bend the rules of law or equity to what would look like distorting them, in order to do so in special instances where an imperfect title is attacked.

As to the enhanced value of the estate, I certainly think a great deal is to be ascribed to the energy, exertions, and outlay of capital on the part of the appellants; but at the same time, I think a great deal more is due to the Rideau Canal, and the settlements and growth of population in the surrounding country; and I doubt not, that if the village and other present improvements had not occurred to the premises, their adaptation to their present use, would render them of very large value now, in comparison with what they were worth in 1826.

Subsequent events, occurring soon after and following that period, have combined to elevate them. But as respects the enterprise and improvements of the appellants, the cases in



the books between mortgagor and mortgagee do not display a sympathy in favour of the improving mortgagee in possession. Looking upon the appellants as mortgagees, and the land a pledge, the authorities discourage, or rather, withhold remuneration for improvements more than are necessary, as calculated to increase the debt, and make redemption the more difficult. They say to the improving mortgagee in possession, you knew the true state of your title—you knew the time open to the mortgagor to redeem—why did you expend large sums in improvements, treat the land as your own, and convert the estate to your own use, without waiting for lapse of time to confirm your title, or obtaining a release or foreclosure to bind the mortgagor and his heirs or devisees.

The utmost time any one had been in possession, when the bill was filed, was fourteen years. William Simpson had been there only eight years, and it would appear that most of the village and other improvements have grown since; and now those improvements, and the sales of portions of the estate that have been made within the above periods, are urged as reasons why the appellants should keep all the property—400 acres—notwithstanding the equity of redemption established by the respondents. I do not, on any ground, feel authorised to say, that the right of redemption which clearly subsisted in 1825 and 6, has been lost by subsequent acquiescence or laches, judging, as well as I can, from the imperfect knowledge I have of the rules established in England in relation to mortgagor and mortgagee.

On the other hand, were I satisfied that the court is, by the 11th section of the 7th Will. IV, ch. 2, clothed with an unshackled discretion, with power to create, as it were, a special equity in this case, regardless of the rules in England, I should be disposed to reverse this decree, in my strong desire to quiet possessions, and to render that a good and perfect title, which in 1826 was (though doubtful) by both parties thought to be valid, and relied and acted upon as such, in the confidence that it could not, or would not, be afterwards disturbed, or that it would be made good by statute. It would, according to my impression of the law of England, and in my view of the counterbalancing equities of the case, be going great lengths; but I think, as the most salutary course, I should be inclined to go thus far.

The considerations that would weigh with me, with others mentioned by the learned Chief Justice, are, that the mortgagor had from 1810 to 1825 (fifteen years) to pay the debt, before any attempt was made by the mortgagee to realize it or disturb him—a long and indulgent forbearance, especially if the mortgagor had any other assets tangible by his credi-



tor: that when the sheriff's sale was made in 1825, though an abortive measure, it was supposed to confer a title—at all events, to create an equity—that would be upheld in any future court of equity: that, although Mr. Charles Jones, Hicock and subsequent purchasers, knew the state of the titles they bought, and that they were questionable, and made guarded conveyances, still they relied upon the title as tenable after so great a lapse of time: that, before any sale was made by Mr. Charles Jones, the opportunity was offered to the mortgagor to redeem or repurchase, by paying the mortgage debt and interest, sixteen years after the breach of the condition—of which he did not avail himself; such offer being made not as his right, but rather as a reasonable indulgence to him: that, in the state of the property in 1825, it was unproductive, and could be of no use to the possessor, without the previous outlay of much labour and expense in improvements: that no one would have purchased it under a defeasible title: that, in this country, people are indisposed to purchase long leases of lands situated as these were; and that, without selling the whole estate absolutely, the amount of the mortgage debt and interest could not have been procured for it in 1826, and, as it stood, it was useless to the mortgagee, whose debt since 1810, at six per cent. (the legal rate of interest), had doubled, without, so far as shewn, any part of either the principal or interest having been paid off: that the mortgagee, if disposed, could not have foreclosed; and the mortgagor was not, apparently, in a situation to have redeemed, had there been a court of equity: that the occupiers, by outlay of capital, labour and exertions upon the premises (otherwise unproductive), and regarding them as their own, have contributed largely to enhance their value, and that the enhanced value, from whatever causes, tempts the present application to redeem: that within twenty years of the condition broken (that is, up to 1831), no offer to redeem was made, though the rising value, towards the close of that period, was calculated to induce it, and the appellants could not foreclose: that, since 1826 (for fourteen years), great changes have occurred in the surrounding country, and a large village been established, and extensive works and improvements been made on the premises, altering the former state of things, and rendering the taking of accounts onerous and difficult. I should also rely much upon the expediency of admitting the sheriff's sale (attended, as it was, by the mortgagor's relinquishment of possession) to create a special equity in support of a long possession and *bona fide* purchase and use of the property as held and owned in fee

simple absolute. It is the strongest feature on which I could rely, although, as a general question, such sales be inoperative in law or equity. Looking back to the state of the country formerly, and the absence of an equitable court, and the way in which mortgagees often proceeded in days of old, there is much in favour of quieting the appellants' title, if we have a discretion to do what I am deterred from doing, only because it looks to me so much like judicial legislation in the particular instance.

If I felt that I had the ample discretion contended for, I would, however, not hesitate to exercise it ; but then I should in future feel called upon to give to other sheriffs' sales, made under like circumstances, a similar effect ; unless some good reason appeared in the particular instance for regarding them as being inequitable or unjust proceedings.

If I could make a decree as an arbitrator, I would place the appellants in a better situation than I feel authorised to do judicially ; but under the 11th section of the act, I think the decree should be modified to the following effect:— Reciting the respondents' relinquishment of all right of redemption against those who have received titles, or hold under contracts for titles in fee from the appellants, Ward and Simpson, to decree an account of mortgage money and interest, and of the improvements according to present value, of what remains the legal estate of the appellants, Ward and Simpson, on the one hand ; and on the other, an account of purchase money received by them, or to be received, upon contracts of sale still executory, &c.

I think Ward and Simpson bound to account for the proceeds of sales. The argument against it seems to prove too much ; for if excusable because they only sold such title as they had, it follows that the right to redeem remains unaffected by, or excepted in such sales. It is inconsistent to refuse to call for the purchase money, as being a speculative sale, and then to rely upon such sales as precluding redemption. As mortgagees in possession, had the parcels sold been only *leased*, the respondents would be entitled to the rents and profits ; being sold absolutely, they are, confirming the sales, equally entitled to the proceeds thereof. I can perceive no substantial distinction. The mortgagees had no right to speculate with the respondents' property ; as soon as the mortgage debt and interest was realised they should have stopped ; all beyond that was surplus, for which they are liable to account.

As to the appellants, Bryce, Lake, Collins and Glass, none of them deny notice, except Lake, as to the first lot he purchased ; but I understand the respondents' counsel, that they

were willing to assent to a dismissal of the bill as against them, as well as to confirm the titles of the other purchasers not made parties. Upon their cases, therefore, I have not applied separate and especial attention.

SMITH, Attorney-General—The practice of the law to which I have been accustomed in the Lower Province, is so totally different from that which is pursued in this part of the province, that I cannot be expected to enter into this case at any length in expressing my opinion, or to give any judgment to compare with either of those just rendered by his lordship the Chief Justice, or Mr. Justice Macaulay; and as I have the misfortune to differ from his lordship on one point, I should not have ventured to express this difference of opinion, had I alone differed, but I should rather have coincided in the judgment of the court, under the belief, that the opinion at which I had arrived was an erroneous one; but supported as I am in this opinion by his honour Mr. Justice Macaulay, in whose able judgment I fully concur, I feel myself constrained to retain the judgment at which I have arrived. The case, in my opinion, hinges on the interpretation to be given to the 11th section of the Chancery Act, and I feel no hesitation in saying, that throughout the whole of the argument, I have been under the conviction, that the 11th clause of that act does not confer on the Court of Chancery the right to refuse redemption, if, under the rules of equity in England, the party seeking redemption could have succeeded; but it only gives to that court, in granting redemption, the right of making such regulations as may be just and reasonable, under the circumstances of each case. Now there is nothing to shew in this case, that Smyth has lost his right to redeem by lapse of time; and there is nothing in the evidence to shew that he intended to waive that right, or acquiesce in the sale of the property. On the whole, I think the equity of the case is in favour of the respondents, and that the decree of the Vice-Chancellor ought to be affirmed.

MCLEAN, J., concurred in the opinion expressed by his Lordship the Chief Justice (*a*)

[The Court being thus equally divided, no judgment could be given; and the case was ordered to stand over until the sitting of the Court in November next, when the case will be re-argued.]

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(a) Owing to the absence of the learned Judge, on the Circuit, it has not been in the power of the Reporter to obtain the judgment at length, in time for publication.

N. B.—Pages 242 to 249 contain a digest of some English Reports published the previous quarter, and being of temporary use are omitted.—*Publisher.*

# THE UPPER CANADA JURIST.

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UPPER CANADA KING'S BENCH REPORTS.

OLD SERIES.

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DOE EX DEM. CANADA COMPANY V. ROE.

The court will, under special circumstances, allow a consent rule in ejectment to be entered without an express admission of the premises mentioned in the declaration, or an admission of being in possession of them.

The court allowed the tenant in possession ; who had been served with the declaration in ejectment in this cause, to enter into the consent rule in the form in use before Michaelmas Term, 1820, upon an affidavit shewing that the premises claimed in the declaration were a particular lot, the possession of which the defendant denied, although he was in possession of a parcel of land for which the ejectment was brought, but which he asserted to belong to and compose part of a lot which he owned, but not that mentioned in the declaration ; and the lessors of the plaintiff not pretending to have any title to the lot which the defendant lived on but insisting that this particular piece of ground was a part of the lot mentioned in the declaration. It seemed that the matter in question would have been better tried by an action of trespass.

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BURRELL V. MILLS.

A reference of a cause to arbitration by order of *Nisi Prius*, may be revoked by either party at any time before award made.

This cause has been referred to arbitration at the last assizes for the Home District ; after the arbitrators had met and heard the evidence, but before they had made any award, the defendant gave them notice in writing that he revoked their authority. They however went on and made an award.



Afterwards, an application being made to the court to enforce it, this revocation was shewn as cause, and the court held that the power of the abitrators was determined by it (*a*).

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## IN THE KING'S BENCH.

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### RULE OF COURT.

TRINITY TERM 1 & 2 WILL. IV.

It is ordered, that no attorney of this court shall take any recognizance of bail as a commissioner, in any case in which he shall be employed as attorney or agent for either party.

JNO. B. ROBINSON, C. J.

L. P. SHERWOOD, J.

J. B. MACAULAY, J.

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## IN THE KING'S BENCH.

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MICHAELMAS TERM, 2 WILL. IV.

ALEXANDER FRAZER V. JAMES BOULTON, ONE, &C.

Where a bill was filed against an attorney in term, but the copy and demand of plea were delivered in vacation, and the plaintiff signed interlocutory judgment and assessed damages before the succeeding term, the court held the proceedings irregular.

A bill was filed against the defendant in Trinity Term last, in *assumpsit*. A copy thereof and a demand of plea were served on the defendant about ten days after the term. Interlocutory judgment was signed for want of a plea as soon as the time for pleading had expired. The defendant gave notice of his intention to set aside proceedings, but the plaintiff notwithstanding assessed his damages.

The court held the proceedings irregular; that the bill though filed takes effect only from the time it is served; and that this case came within the meaning of the rule made in Easter Term last.

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(*a*) 8 Rep. 162; Brownl. 62; 15 Ea. 209; 1 Bing., 87; 7 Moore, 403; 7 Ea. 608; 5 Taunt. 452; 1 Mars. 66, 404; 2 B. & C. 347; 2 B. & A., 395; 1 Chit. R. 204; 10 B. & C., 483; 8 D. & R. 100; 1 McL. & Y. 276.

## BAKER V. GARRETT.

Where no proceedings had been taken in a cause for four terms, the court set aside an assessment of damages for want of a term's notice.

In this case interlocutory judgment had been signed, and notice of assessment of damages was given for the assizes in the Home District, in October, 1830. During those assizes, the plaintiff's attorney received a letter from the defendant, requesting the items of the plaintiff's demand, and the amount of the costs, as he was desirous of arranging; the information was promptly given, and in anticipation of a settlement, damages were not assessed. Very shortly afterwards the plaintiff's attorney received a letter from an attorney on behalf of the defendant (which was put in), offering to pay the debt, and District Court costs, which at that stage of the proceedings was declined. In the winter following, a similar proposal was made on behalf of the defendant by the same attorney to the plaintiff himself, which was also declined. After Trinity Term, 1831, another notice of assessment was given, and damages were assessed at the last assizes.

*Washburn* on a former day in this term obtained a rule *nisi* to set aside the assessment of damages, on the ground that four terms had passed without any proceedings, and that a term's notice was necessary; he contended no distinction was to be drawn between cases where issue was joined, and where interlocutory judgment was signed and damages assessed.

*Ridout* shewed cause.—As the damages were not assessed in consequence of the defendant's proposition, and an opportunity of assessing was thereby lost, any strict right to a term's notice was waived, and this position was strengthened by the proposal made by the defendant's attorney in the winter following. He cited the following authorities as bearing on the general question: 3 T. R. 350; 2 Bl. Rep. 762; Burr. 660; Taylor, U. C. Rep. 624.

But a term's notice is not necessary except in cases where issue is joined, and therefore the rule does not apply to a case, where damages only are to be assessed. He cited in support of this position, 2 B. & A. 594; 2 Bl. R. 1224; 5 T. R. 634.

*Washburn* in reply, urged that any thing which had been shewn by the plaintiff, did not amount to an agreement that the proceedings should be stayed, and that it was incumbent on the plaintiff to shew that he had taken some steps within the four terms.

*Per Cur.*—Under the circumstances of this case we think the plaintiff should have given a term's notice before he assessed his damages.

Rule absolute with costs.

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### GOULDRICH V. McDOUGALL.

Where a general verdict has been returned for the plaintiff on several counts, one of which is bad, but it appears the plaintiff elected to proceed on a good count at the trial, the court will allow the verdict to be amended after motion in arrest of judgment without costs.

Trespass. Declaration contained three counts; one for a forcible entry under the stat. 8 H. 6 cap. 9, declaring on an estate in fee simple; secondly, a count for a forcible entry under the same statute, declaring on a tenancy from year to year, following the precedent in 2 Chit. Pl. 865; the third count was for a common trespass, *quare clausum fregit*; a general verdict was taken for the plaintiff at the Home District assizes.

• *Draper*, for the defendant, moved in arrest of judgment, and argued that an action could not be sustained for a forcible entry, on any estate less than freehold.

*Sullivan*, for the plaintiff, agreed that the second count was bad, but stated that at the assizes he had, as counsel for the plaintiff, abandoned the first and second counts in his opening, and the verdict was entered generally by mistake; and moved to amend the verdict.

The court, on hearing the notes of the Chief Justice, who tried the cause, granted a rule *nisi* to arrest the judgment, and also a rule to shew cause why the verdict should not be amended, returnable at the same time; and on return of the rules, granted a rule absolute to amend the verdict by entering it for the plaintiff on the first count, and to discharge the rule granted to shew cause why the judgment should not be arrested without costs.

## DOE EX DEM. BRADT V. HODGKINS.

A deed of bargain and sale, purporting to convey the real estate of a *feme covert* in which the husband is not named as a party, but only in the description of the *feme*, is not effectual under the provincial statutes enabling married women to depart with their real estates, although signed and sealed by the husband.

At the Niagara assizes, a deed of bargain and sale was put in evidence for the plaintiff, purporting to convey an undivided part of a lot of land, the estate of a married woman; the name of the husband was not mentioned in the indenture as a party thereto, but as part of the description of the married woman, she was stated to be his wife; the deed however was signed and sealed by the husband.

The point was reserved, whether or not the deed was sufficient under the provincial statutes 43 Geo. 3, chap. 5, and 59 Geo. 3, chap. 3; and now,

*Draper*, for the defendant, relied upon the statutes as conclusive. The *feme covert* in this instance cannot be said to have made the deed jointly with her husband, as he was not named as a party to it, and the signing and sealing by him did not make him a party.

*Burns*, for the plaintiff, argued that the object of the statutes was to allow married women to depart with their real estate, with the privity and consent of their husbands, and that such privity and consent was as fully testified by the husband's signing and sealing the deed, as if he had been named in the body of it as a party; and he cited 4 Com. Dig. 264.

ROBINSON, C. J.—Nothing can be clearer than that the deed upon which this question arises, cannot be good. The deed of a *feme covert* is absolutely void, though according to some authorities it may be made effectual by a second delivery after the death of the husband.

By the law of England she could not divest herself of her estate, but by fine and recovery, in which her husband must join; our statute enables her to convey by deed jointly with her husband, but certainly the husband is not a party to this deed; mere signing and sealing cannot make him so,



when he is not expressly made a party in the deed itself; 2 Inst. 673, if any authority could be wanting, is in point (a).

*Per Cur.*—The verdict was ordered to be amended, as to the part of the land mentioned in the indenture as conveyed by the married woman.

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BEASLY V. DARLING ET UX.

Where the evidence at the trial was applicable to a good count only, and a general verdict, the court allowed of an amendment without costs, by entering the verdict on the good count, after a motion made in arrest of judgment.

*Assumpsit.* Declaration, first count on promissory note made by wife before coverture; second, on account stated with husband and wife. General verdict for the plaintiff for the amount of the note and interest.

*Kirkpatrick* moved in arrest of judgment for defect in the second count, the account being alleged as settled with a *feme covert*, who could not legally state an account or enter into a contract.

*Bethune* moved to amend by entering verdict on the first count.

ROBINSON, C. J.—The only point remaining for consideration is, whether the plaintiff shall be allowed to amend his verdict by the judge's notes without paying costs; and after looking into the practice on this point, I think he should; there was not a particle of evidence which applied to any count but that in the note. The taking a general verdict, therefore, was but *vitium clerici*, and upon the authorities of *Tilt v. Bishop of Worcester*, 1 Ld. Ray. 94, and *Smith v. Fuller*, *idem*, 116, and a case in 3 Mod. 112, all of which are recognized in modern treatises, the distinction seems to be, that in cases so plain in favour of the amendment, it may be made without costs before judgment entered or error brought. If after error, costs are to be paid (b).

*Per Cur.*—Rule to amend made absolute, and rule to arrest the judgment discharged without costs.

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(a) The deed was an indenture to which were several other parties besides the *feme covert*.

(b) See also *Gouldrich v. McDougall*, ante 212.

## YUILL V. HARVEY.

Replication to a plea in abatement for non-joinder of defendants, is not double because it answers the plea as to the two persons whom the plea states ought to have been joined singly, giving a separate reason as to the non-joinder of each. Plea in abatement bad under the provincial statute respecting joint obligors and contractors, for not stating expressly that the joint obligor or contractor was, at the time of plea pleaded, living at some place within the jurisdiction of the court ; but it is not necessary in a plea in abatement for non-joinder, to state that the joint obligor or contractor was alive within the jurisdiction of the court at the time of action brought.

*Assumpsit.* The defendant pleaded in abatement, that there are two other persons not joined who ought to be made defendants. The plaintiff replied, denying as to one that he was a joint promiser with the defendant, and stating that at the time of the promise the other was an infant, and had avoided his promise on coming of age. Defendant demurred, assigning as special cause that the replication was double.

*Solicitor General*, in support of demurrer, insisted that the replication was bad, as two facts were put in issue, either of which would have falsified the plea in abatement, and this difficulty arises ; suppose the defendant be willing to admit the infancy of the person stated in the replication to be an infant, and yet wish to go to issue on the other fact, he cannot do it without a departure from his plea. If it be true that either of the persons mentioned in the plea in abatement, as not joined as defendants, ought to have been joined, it is plain the writ ought to abate ; and yet if the judgment of the court should sustain the replication, the effect would be to uphold the writ, which in such circumstances ought to be abated.—1 Starkie, N. P. C. 25 ; 3 Esp. N. P. C. 76 ; 1 Wils. 89 ; as to plea of infancy 3 Taunt, 307.

*Bidwell* against the demurrer.—That a plea may contain several facts, and yet not be double, as the whole contains but one proposition. The replication only answers all the matters stated in the plea ; if only one of the facts stated had been answered, it would have appeared on the face of the pleadings that the writ ought to abate. The plea is bad, because it does not shew that the joint contractors, which it states ought to have been joined as defendants, were at the time of the commencement of this suit living, and within the jurisdiction of the court. The cause in 7 T. R. 243, shews the *venue* as laid in the plea under a *scilicet* is bad

pleading; and on demurrer to a plea in abatement, objections may be made to declaration; 4 T. R. 224. So in this case *a fortiori*: on demurrer to a replication to a plea in abatement, objections may be taken to the plea (a).

*Solicitor General*.—They have answered over, and so cured the objection as to the *venue* (b).

ROBINSON, C. J.—This replication is demurred to, and the cause specially assigned is that it is double; but it certainly is not double, because the plaintiff has replied singly as to each of the persons, and given but one reason for not joining each.

It is urged that the replication is liable to other objections, but upon these I need express no opinion, for I look upon the plea to be bad, not because it is not stated that the two persons not joined were alive and in this province when the action was brought; that I think is not necessary even under the provisions of our statute respecting joint obligors and contractors. It is sufficient if the defendant gives the plaintiff a better action, by shewing whom he may sue at the time of the plea pleaded; and the words of the statute are, that the action shall not abate, unless the party pleading such matter in abatement shall shew to the court, that such joint obligor, contractor or partner, *is living* within the jurisdiction of the court, so to be served with its process conformably to law; *that is, living within the jurisdiction, &c., at the time of plea pleaded*. The defect in the plea consists, I think, in not stating expressly that the persons not joined, are living at some place within the jurisdiction of the court. The utmost particularity and certainty are necessary in pleas in abatement, and in this cause the fact should have been pleaded at least as directly and as positively as in the words of the statute; but on the contrary the allegation is all together too general and indefinite. And at all events, I see nothing substantially defective in the replication; the plaintiff must have judgment on this demurrer. Respondent ouster.

*Per Cur.*.—Judgment against the demurrer.

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(a) 1 Saun. 237; 2 Saun. 50; Munsel on Demurrer, 81.

(b) *Vide* Arch. Plea. & Ev. 320; Lutw. 1592, 1667, 1604; 1 Salk. 212; Carth. 172, which seem opposed to the case in 4 T. R. 224.

## STINSON V. SCOLICK ET AL.

Court will not set aside non-suit granted at the trial, the witness for the plaintiff being absent ; the action being against magistrates acting in the execution of their offices.

This was an action against the defendants, as magistrates acting as Commissioners of the Court of Requests. The plaintiff was non-suited at the trial, his principal witness not being in court.

*Draper* and *Dickson* obtained a rule to shew cause why the non-suit should not be set aside, and a new trial granted, principally on the ground that the time limited by the statute had passed by, and that the suit could not be commenced *de novo*.

*Sullivan* shewed cause, and argued that the ground of the plaintiff's motions was one of the strongest why the motion should not succeed—the action being against magistrates, in whose favour the law strongly presumes innocence, and for whose protection several statutes have been passed. Besides, this is a penal action ; if convicted, the defendants may become liable to double costs ; and the court will not disturb or non-suit a verdict in favour of the defendant in such actions.

ROBINSON, C. J.—I think the granting a new trial in this case would be contrary to the usual practice ; and certainly such a departure should not take place in an action against magistrates, who, for all that appears (for there is no affidavit of merits), may be vexatiously prosecuted for a mere slip in their proceedings. If they are convicted, they may become liable to double costs under the statute, and therefore the action is in a manner penal. No authority has been cited to support the application, and I apprehend none can be.

*Per Cur.*—Rule discharged.—MACAULAY, J. dissenting.



## BALLARD V. WRIGHT.

A declaration cannot be regularly delivered before common bail filed or appearance entered ; and the irregularity is not cured by an attorney accepting the declaration, without denying that he is attorney for defendant.

*Sullivan* moved for a rule *nisi*, to set aside the service and filing of the declaration and subsequent proceedings. The proceedings were as follows :

Declaration filed and plea demanded on the 25th August, and never afterwards; there was no appearance by the defendant, nor by the plaintiff for him, nor common bail, until after the declaration filed, viz. 13th September, when plaintiff filed common bail for the defendant. Interlocutory judgment was signed for want of a plea. The interlocutory judgment was signed by filing a slip of paper, expressing that interlocutory judgment was signed in this cause for want of a plea, but there was no *incipitur* of the roll or declaration filed.

The motion was stated to be on two grounds ; first, that declaration was filed before the appearance (*a*) ; secondly, that the interlocutory judgment was irregularly signed without an *incipitur* of the roll and declaration (*b*).

*Boswell* shewed cause, and relied upon circumstances stated in affidavits, that the declaration had been served on an attorney of the court, as defendant's attorney, who did not refuse it ; and that some conversation had taken place between the plaintiff's attorney, the same attorney who did not deny that he was attorney for the defendant.

ROBINSON, C. J.—By filing common bail 15th September, plaintiff seems to have waived his former declaration and demand of plea, (if they could have been rendered effectual by defendant's acceptance of them) and he could not afterwards sign judgment till he had demanded plea, after he had appeared for defendant. To proceed as plaintiff has done here, is contrary to the statute 2 Geo. IV., and to our rule of court Trin. T. 4 Geo. IV., (1824.)

I see nothing in plaintiff's affidavit shewing that the declaration was accepted, or the irregularity waived ; nor do I see on

(*a*) 2 T. R. 719 ; Forrest 33 ; 2 Chit. R. 165.

(*b*) 2 Arch. P. 29.

what ground he calls Mr. Whitehead defendant's attorney, and relies on a conversation with him, since defendant has not appeared by attorney, or pleaded; and on the contrary plaintiff has appeared for him, though too late, and served declaration on him personally.

*Per Cur.*—Rule made absolute with costs.

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DOUGLASS V. POWELL.

A bail bond is irregular in a case where the action was commenced by process not bailable, and the arrest on bailable process after appearance entered.

Defendant was arrested under the provincial statute 2 Geo. IV. chap. 1, in an action already commenced by non-bailable process, in which he had appeared; the sheriff took a common bail bond.

*Washburn* obtained a rule to shew cause why the bail bond should not be set aside with costs.

*Draper* shewed cause, and argued; first, that the statute gives the sheriff no authority to take special bail; secondly, that it does not direct or intimate any indorsement on the writ different from that on common bailable cases; and how is it to be indorsed? is the sheriff to be directed to do what he cannot do, i. e., to take special bail; thirdly, that if the bail bond were held to be irregular, such construction would be oppressive to defendants, and against the liberty of the subject, as the sheriff would be obliged to keep the defendants in custody till bail perfected and allowed, and *superseas* issue; in outer districts this would keep defendants in custody two or three weeks.

ROBINSON, C. J.—The bail bond is irregular; the condition is, that the defendant shall appear, but he had appeared already; the condition is therefore absurd. It is clear that the sheriff ought not to discharge the prisoner until special bail put in.

*Per Cur.*—Rule absolute.

## KAUNTZ V. CAMERON ET AL.

Plaintiff cannot waive special bail on a bailable writ, and proceed by filing common bail as on common process.

Process was returnable last Easter Term, bailable against one defendant, not bailable as to the other; an application was made to a judge to set aside the proceedings for irregularity, the decision of which was deferred until term, but the application was not renewed. The plaintiff entered common bail for both defendants, and served declaration and demand of plea on both, and signed interlocutory judgment for want of a plea.

*Jas. Boulton* moved to set aside the common bail and subsequent proceedings for irregularity. Rule *nisi* granted.

*Solicitor General* shewed cause, and contended that the plaintiff might waive his right to special bail (*a*) that the proceeding by arrest was a higher remedy than that by common process, and that when the right to special bail was waived, the effect could not be to abate the suit, but the lesser remedy was left. It may be said, that the statute provides for the practice common bail and appearance, and that no such proceeding could be adopted without following all the requisites mentioned by the statute of copy, English notice, &c., but it is a common course in England, as well as in this Province, in cases where the arrest is set aside for irregularity in the affidavit of the debt or otherwise, to order it, on *filing common bail*, and in those cases the suit goes on as if there had been common process with copy and English notice; why should the filing common bail in the one instance help the plaintiff contrary to the statute, and not in the other; besides, the defendant is too late in his application, he ought to have moved without loss of time.

ROBINSON, C. J.—It is clear, that a defendant must be fully before the court, before interlocutory judgment can be signed against him (*b*). The plaintiff here chose to enter common bail for defendant, who had been arrested; that was a merely void act, and could not have the effect of placing this defendant before the court (*c*). By delivering a declara-

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(*a*) 1 Arch. Prac. 103. (*b*) 2 Arch. Prac. 9. (*c*) Arch. Prac. C. P. 31.

tion he has waived special bail, but I do not find it therefore follows, that he can regularly proceed as if the defendant had not been arrested; that would be contrary to our statute; and I see no act done by this defendant which implies an admission that he is in court; he is served with a declaration on the 13th July, he had after that no opportunity of applying to the court before the judgment was signed, and I think it would be hard to conclude a defendant in so remote a district because he did not apply in the interim to a judge here. Judgment was signed on the 12th August, and notice of motion to set it aside was given in four days after and eight days before the damages were assessed.

There is a case of *Williams v. Strahan*, in 1 New Rep 309, which might seem to bear against this application, but in the first place our practice is prescribed in this respect by statute; in the next place it is repeatedly stated in that case that the defendant had acted as if an appearance had been entered, what he did is not stated; this defendant is not shewn to have done any thing; if he has waived the irregularity it must clearly be by omission; but further, if common bail had been entered in that case, (*Williams v. Strahan*), it would have been regular, because there had been no arrest; here common bail was entered which was irregular, and the acceptance of a declaration can never be an *admission that bail* has been put in, though the delivering it too soon, may prejudice the plaintiff as being a waiver of bail.

*Per Cur.*—Rule made absolute.

JNO. B. ROBINSON, C. J.

L. P. SHERWOOD, J.

J. B. MACAULAY, J.



## KING'S BENCH.

HILARY TERM, 2 WILL. IV.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE  
BANK OF UPPER CANADA V. WIDMER.

A several obligor is a competent witness in an action against a co-obligor, to prove the cancelling the obligation by tearing off the seal of the co-obligor. An action of trover may be maintained against the obligor in a bond for securing the fidelity of a clerk, the obligor having torn off his seal, (and this although the bond might be considered as still subsisting, and sufficient to sustain an action of debt), and damages may be recovered against the obligor to the amount of the penalty.

A bond may be given up to be cancelled by the president and directors of a banking corporation, without the appointment of an attorney.

The plaintiff declared in case.

First count, that whereas the said plaintiffs heretofore and before and at the time when, &c., were lawfully possessed of and entitled to, a certain bond bearing date the sixth day of March, 1826, and sealed with the seal of the said defendant, whereby the said defendant acknowledged himself to be held and firmly bound to the said plaintiffs in the sum of £1000.

And afterwards, and before the committing, &c., to wit, on the first day of January, 1830, at York; the said bond was deposited in the Bank of Upper Canada, under the care of the cashier of the said plaintiffs, which said cashier, at the request of the said defendant, suffered and permitted the said defendant to take the said bond into his hands to look at and examine it; and the said plaintiffs further say, that the said defendant whilst he had the said bond in his possession and custody as aforesaid, to wit, &c., contriving &c., without any reasonable or probable cause whatever, and without the licence of the plaintiffs, cut and tore off the seal of him the said defendant from the said bond, and defaced and cancelled the same, by means whereof the said bond hath become and was of no use or value to the said plaintiffs, and the said plaintiffs have been by means of the premises otherwise greatly injured and damnified.

Second, alleges the property and possession of the plaintiffs in a like bond, omitting the statement of its being in the hands of the cashier, and then proceeds: "yet the said defendant contriving, &c., afterwards and while the said plaintiffs were entitled to the said last mentioned bond, and the said sum of money therein mentioned, continued due and unsatisfied to them the said plaintiffs, to wit, &c., unlawfully and unjustly, and without the licence or consent of the said plaintiffs, cut off the seal of him the said defendant, from the last mentioned bond, by means whereof the said last mentioned bond hath become and is of no use or value to the said plaintiffs, and the said plaintiffs have been and are by the premises otherwise greatly injured and damnified."

Third count was a common count in trover.

Plea, not guilty.

The issue came on to be tried before the Chief Justice, at the Home District Assizes after Trinity Term last. On the part of the plaintiffs a bond was produced dated 6th March, 1826, by which the defendant and three other persons severally bound themselves to the plaintiffs, in the penal sum of £1000, which bond was conditioned for the faithful discharge of the duties of discount clerk by Francis Ridout. The execution of this bond by the defendant was proved, after which the cashier of the bank gave the following facts in evidence. This bond came into his possession from the president of the bank, who usually keeps instruments of this nature in the bank; it was given to witness by the president, to have a copy made of it in July or August, 1830; it was in a tin case of the witnesses's. The witness was asked by the defendant for his bond, who told the defendant that it was in the box, and if there, Mr. Anderson would give it to him (Mr. Anderson was one of the clerks of the bank), witness believes that Mr. Anderson did accordingly give the bond to the defendant; the witness did direct it to be given to the defendant.

When the defendant asked for the bond, the witness understood it was for the purpose of obliterating it. The witness thought there would be no impropriety in his doing so, as he the defendant, had executed a new bond. Francis Ridout,

when the first bond was given, was discount clerk. The second bond was given in the same penalty, and by the same parties, that the same Francis Ridout shall execute faithfully the duties of another office, i. e., teller of the bank, which was considered a higher one. This new bond was kept by the president of the bank, and was executed a day or two before witness gave up the first bond to the defendant. The witness supposed the first bond should be given up, and gave it up not in pursuance of any instruction, but under his own idea, that it was right to do so. The defendant was at this time one of the directors of the bank, and has been a director from thence hitherto. After the defendant had taken his own name off the bond, at the next discount day at the board of directors, he asked witness for the bond, that he might take off Mr. Crookshank's name, saying Mr. Crookshank had requested him to do so.

At the time the defendant took off his own name, he redelivered the bond so cancelled as to him, to the witness, who laid it before the board at their next meeting, and it was at this time that defendant requested it at the board for the purpose of taking off Mr. Crookshank's name and seal; he the defendant took it up from the table, from before the president, where it was lying, and he then openly took off Mr. Crookshank's name and seal, and laid it down again on the table before the directors; within or about a fortnight afterwards, witness heard it regretted (he thinks at the board) that the bond had been so cancelled.

Mr. Crookshank's name was cut off at the board, after the board was formed, and after they had commenced business there must have been seven directors. The consent of the board was not asked; defendant made his request openly, he addressed the request to witness for the bond; perhaps some did not hear it; has never since heard any of the directors say that he did not notice it. The defendant stood up near the president. No entry was made of this cancelling as an act of the board; all that is transacted as the public act of the board is minuted by witness, as cashier; witness did not consider it as a public act of the board, there was no order of the board for it; witness did not ask any one before he let

defendant cut off his own name, whether he might do it, neither the president nor any director, but did it considering that the new bond being taken made it proper; the bank have sustained a greater loss than the penalty of that bond, from the misconduct of that clerk; the individual directors do usually at the board take up any paper lying at the board, at pleasure; had he not been a director, defendant could not have taken up the bond as he did, (without express consent); thinks that the new bond was the same day laid on the table.

John Ridout, a witness for the defendant, gave evidence as follows: he was a witness to the second bond, he saw the defendant execute it, he expressed his determination in the presence of witness in his house, that he would have the first bond destroyed, and he was assured by Francis Ridout, that that bond had been given to him by the president, to make the new one from, and that it should be given up when the new one should be executed, it was yet to be signed by others, he was unwilling to execute it until he was told that, he is not sure whether after signing he gave the second bond or kept it himself.

Samuel Ridout, Esq., a witness for the defendant, was a director at the time the bond was cancelled; he was present as a member of the board, when it was proposed to give this new situation to Francis Ridout; he was called in and asked if he would like to accept it, and told that it would be higher in name but the emolument the same; he made some remark about sureties, and according to the witness's recollection, the president, at the board and in the presence of the directors, stated to Mr. F. Ridout that probably the same persons would go his security, and that on their signing the new bond, the other would be given up to him. The witness (who was one of the several obligors) certainly signed the bond under that impression.

The Chief Justice directed the jury, that they were not to consider the delivery of the bond by the cashier to the defendant, in order to its being cancelled, as an act within the scope of the cashier's general authority, so as to infer the assent of the president and directors upon that ground merely, or rather so as to bind them necessarily by his act; they were



directed to enquire whether when that was done it was done with the assent of the board, which they might gather from the conduct of the board, either before or after; and they were directed further, that the act of the cashier, though it might not have been clearly authorised at the time, might be made the act of the directors by their subsequent adoption of it, that is by their assent either expressed or satisfactorily implied. In conclusion, the jury were told, that if they found the act of tearing off the name and seal to have been done by the defendant wrongfully, without the consent of the president and directors, they should find for the plaintiff's; they were then further directed upon the subject of damages, in the event of coming to the conclusion of finding for the plaintiff.

Exceptions were taken at the trial to the part of the charge concerning damages, which it is unnecessary to consider in the present case, as the jury returned a verdict for the defendant, and in answer to a question put to them by the court at the request of the *plaintiff's* counsel, they declared that they found their verdict on the ground, that the president and directors had assented to the cancelling of the bond. In Michaelmas Term, the *Attorney-General* moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted.

First, on the ground of misdirection.

Secondly, because illegal evidence was received.

Thirdly, on the ground of surprise.

The *Attorney-General*, on moving for the rule *nisi*, said that the judge at the trial had misdirected the jury, inasmuch as the jury were directed to answer whether the president and directors had expressly or impliedly assented to the cancelling of the bond; they could not have released the bond, or agreed to its cancellation, unless by deed under the seal of the corporation; although there were certain acts which may be done by the president and directors without the seal, yet these acts were either strictly defined by the statute chartering the bank, or else were necessarily connected with the ordinary and daily details of its business, such as the issuing promissory notes, or the discounting notes of hand, the pur-

chasing bills of exchange, and such matters ; but the giving up this bond to be cancelled, was altogether an extraordinary proceeding, such as neither the statute or any usage of this or other corporations allowed. If, therefore, the president and directors could not by an express assent, have legally given up the right of the corporation by any act of less solemnity than a deed under the seal of the corporation, still less could such assent be implied against them, from the unauthorised act of their officer, or the silence of the board of directors at the time the name of Mr. Crookshank was taken off the bond. There was not in this case any minute or entry of the assent of the president and directors to the cancelling of the bond.

The defendant had no right to have proved either by cross-examination at the trial, nor by the witnesses for the defence, that the bond had any condition ; by his own wrongful act he had destroyed the bond with the condition, and after having destroyed the defeasance to the bond, he cannot set it up ; by his act he made it a single bond, and by the conversion of that bond, the property was vested in the defendant, who must therefore answer for the whole penalty. The bond was destroyed, and the plaintiff could no longer bring an action of debt upon it, and it did not matter whether any damage had been suffered or not by the misconduct of Mr. F. Ridout, as the condition was destroyed and could not again be set up. The admission of this evidence was a surprise upon the plaintiffs, inasmuch as if they had been at all aware that such evidence would have been offered or admitted, they would have been able to disprove the evidence by other testimony.

Mr. Samuel Ridout was inadmissible from interest, an action on the same bond being pending against him for his several penalty.

The *Attorney-General* quoted the following authorities : 1 B. & C. 684 ; 5 Co. 23, 119 ; Com. Dig. Act. F. 2, 860, 826 ; M. C. & J. 466 ; 4 B. & C. 106 ; Crosse, 255 ; Cro. El. 626, 800 ; Morgan's Vad. Me. 2164 ; Com. Dig. Act. on the Case, A. 6 ; Palm. 403, 4 ; T. R. 457, 339 ; Touch. 70 ; 21 Lev. 220.

He also produced affidavits from several of the directors, and a release from the defendant to the corporation.

*Per Cur.*—Rule *nisi* granted.

The *Solicitor-General* shewed cause.—It could not be a misdirection to refer to the jury the question of the lawful or unlawful cancelling of the bond, as on that question the whole action depends. So that the first ground of objection to this verdict is embraced in the second, namely, the admission of improper evidence. As to the interest of Mr. S. Ridout, he being sued on the same bond, he was severally bound, and the evidence would rather militate against himself than be in his favour, as it would tend to discharge the present defendant at his expense. (The *Attorney-General* here stated that he abandoned the point as to the interest of Mr. S. Ridout.) The objection then resolves itself into this, whether or not improper evidence were received to prove that the bond was lawfully cancelled. The jury have expressly found that the bond was cancelled with the assent of the president and directors; it is objected that such assent could not be given unless by an attorney, appointed under the seal of the corporation, or by deed expressly authorizing such cancelling. But no authority is produced, shewing that the persons having the direction of the affairs of the corporation, could not give their assent legally in the manner proved; it is not pretended that they could not accept the bond, hold it as their property, and use it as such, without the authority of the seal of the corporation. It is evident that the president and directors accepted the second bond, and that such bond was legal and binding; then can it be maintained that the very consideration of the new bond being given, namely, the cancelling and giving up of the old bond, was an act beyond the ordinary authority of the president and directors. It will be found, on reference to the authorities, that the ancient legal strictness requisite to bind a corporation, has been in a great degree departed from, and that many acts are considered legal and binding on corporations without the seal, in the doing of which formerly it was considered requisite. The assent to the cancelling of this bond, was not more out of the ordinary course of the business of the president and directors, than the appointing of the officer, the naming of the securities, and accepting and using the bond. It may be plain, as stated on the other side, that where an

estate or interest is vested, that a mere cancelling an instrument will not divest the estate ; but in the case of a bond the authorities are numerous, and shew that the cancelling the bond, where the act is not done wrongfully, but with the assent of the obligee, is sufficient to defeat the instrument. It would be strange indeed, if the new bond should be considered valid, and at the same time the act in consideration of which it was given void and of no effect. The plaintiffs cannot be allowed to set up their own want of formality in cancelling the bond ; it was impossible for the defendant to force them to cancel it, or to make an entry or minute of their assent on the journal of the transactions of the president and directors ; it was then wrong not to make such entry and therefore they ought not to be allowed to take advantage of it. Besides, this action cannot be sustained ; no damage is proved from the alleged cancelling of the bond. If the bond were mutilated or destroyed illegally without the assent of the corporation, expressed by their proper officers, it still retains all its legal effect. The destruction of the bond by the obligor, can never be held to cancel it, so as to destroy the right of action upon it. The damage suffered in this case is the loss of so much paper and wax as the name and seal covered. The bond, if the name and seal be wrongfully torn off, remains in full force, and an action of debt remains upon it, to which a recovery in this action would be no bar if not done tortiously ; this action is of course unfounded, so that the setting aside the verdict for the defendant, and granting a new trial, even granting all the grounds alleged for doing so to be sustained, would be a nugatory proceeding, and not tending to the benefit of either party (a)

*Draper and Sullivan* on the same side.—The argument of the learned Attorney-General would go to prove that no business of the corporation could be transacted, unless under the seal, except what is particularly mentioned and allowed in the statute creating the bank ; but the statute will be found to give the president and directors generally, the power to manage the stock, property, affairs and concerns of the bank,

(a) Shep. Touch. 69, 70 ; Co. Lit. 225 ; Dyer 59 ; Co. 11, 28, 5, 23 ; Dyer 112 ; Per. Sect. 112 ; Per. Sect. 135, 136 ; Bro. Ob. 83 ; Vin. Ab. Fact, J.



and there is nothing in the statute to restrain them from giving up this bond to be cancelled. It is not argued on the part of the defendants, that under this power the president and directors can do an act without the seal, that a private individual could not do legally in the same manner; for there is no question but that if an obligee assent to the cancelling a bond, and that it be cancelled, there is nothing further necessary to discharge the obligor (*a*). The cases cited, on moving for the rule *nisi*, will by no means be found to uphold the doctrine of the necessity of the seal in all acts binding on a corporation, and even the strictness formerly required, has been greatly relaxed, as appears by the late cases. If it be once established, that the seal of the corporation was not necessary, it cannot be shewn that any entry on the books of the bank, or in the minutes of the acts of the directors, was required to make the assent to the cancelling of the bond legal. The custom of the bank to enter their proceedings in a book, cannot affect the rights of others nor can the breach of such a custom be held to give them an advantage; their books were within their own control to make the entry or not as they pleased, and the defendant could not either force them to make such entry, or see that it was done. The jury have found the fact of the assent specially, therefore there is no necessity to enter into the argument as to the reasonableness or impropriety of their verdict; it was a fact purely for the consideration of the jury, when the forms and solemnities insisted on as necessary by the plaintiffs are decided to be unnecessary. But suppose the plaintiffs' argument correct, still the verdict ought not to be disturbed, as the action cannot be maintained in this form. The first and second counts, although in point of form apparently intended to be in case, yet they are substantially in trespass, and cannot be joined to the count in trover.

If the name and seal were torn off by the obligor wrongfully, the bond still has all its legal effect, and an action of debt will lie in which the damages could be assessed and ascertained for a breach of the condition. The conversion

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(*a*) 1 P. Williams, 191; 1 Mod. 19; 3 Leo. 167.

of the bond, if the momentary possession of it could be called a conversion, would only entitle the plaintiffs to nominal damages, which as they are evidently not what the plaintiffs seek to recover, the court will not set aside the verdict to give them.

There was no evidence before the court of a nature sufficiently specific, to shew that there was any breach of the condition of the bond, or that the plaintiffs were entitled to any thing, or if any thing, how much, in consequence of it; therefore the damages, if any could be given, must have been nominal.

The plaintiffs in this form of action, and according to the argument of the plaintiffs' counsel, insist that they are entitled to recover the whole penalty of £1000 against the present defendant. They would, by the same reasoning, be entitled to recover the same against each of the obligors, and all without any proof of a breach of the condition of the bond, or any regard had to the amount of the damages really sustained by the plaintiffs. It is true there was a loose and general item of evidence given, that the plaintiffs had suffered more than the £1000 penalty, by the misconduct of the clerk, but can this entitle them to recover £4000, or would such evidence, given without any apparent knowledge of the exact amount of damage, and without the production of any of the books or documents by which the knowledge of the fact is arrived at, be considered legal evidence in any form of action? The plaintiffs never relied on it as evidence, as the action was conceived on the principle, that the defendant by cancelling the bond deprived himself of the opportunity of ever setting up that there was a condition thereunder written, and consequently the whole penalty must be considered as a debt; but the absurdity and injustice of the conclusion the plaintiff's argument inevitably leads to, is sufficient to shew that it cannot be founded in law. In this case there could no damages arise in future according to the evidence; the employment of the clerk was at an end, the bank could suffer no more than they had done, therefore the plaintiffs were not entitled to recover any thing, on the ground that by the cancelling the bond they lost their security

against future loss; therefore if an action of debt were brought on the bond, even if the condition were proved broken, they could only have recovered the amount of damages strictly proved. The action of debt being one restricted by rules of pleading, and the strictness of the common law, which made any breach of the condition of a bond a forfeiture of the whole penalty, made the statute of William and Mary for the assignment of breaches and assessment of damages on penal bonds necessary. This statute had all the effect of restricting the right of the obligee to the recovery merely of his real debt or damages; can it be said that by altering his form of action, he gives himself a right to recover the whole penalty, and thus in effect to repeal the statute. In an action on the case, the plaintiffs are bound to set out their whole cause of action, and shew their right to damages; if this action can be sustained at all, the declaration ought to shew that the bond had a condition, that this condition had been broken, and in what manner, that by the breach of the condition, the plaintiffs became entitled to recover certain damages, and that by the cancelling or conversion of the bond, they lost their remedy. If the declaration were in this form, the case could have been as conveniently tried, as in an action of debt; the defendant would have been allowed to cross-examine the witness as to the breach of the condition, or to bring evidence to shew it unbroken, or to limit the extent of the damages, which it seems allowed he cannot do as the pleadings stand. The want of this statement causes a variance between the instrument produced, and the one given in evidence, which is a fatal variance, and this not on any captious ground, but on a point with which the substantial justice and merits of the case are intimately connected. The cases in 8 Co. 826, are, first on an arbitration bond where the obligor revoked the submission; and the second, where the condition of a bond was, that the obligor should give leave to the obligee for the space of seven years to carry wood, which license he countermand; and it was decided, that the obligors forfeited their bonds. There is no question of the law as here decided, but do these cases shew that the obligees would be entitled to the whole penalties

since the statute of William and Mary. The case in 4 B. & C. 106, is an action on a parol agreement to abide by an award, under a penalty of £100; the defendant revoked, and the penalty was considered as liquidating damages, by the agreement of the parties. None of the cases support the doctrine on which this action can be sustained, therefore the court will not set aside a verdict for the defendant, when the result of another trial would be the plaintiffs' being non-suited, or another verdict passing against them.

The *Attorney-General* in support of the rule.—The argument for the defendant is avoided, supposing all that is alleged on his behalf to be true; defendant's counsel alleges that the bond is not cancelled, unless done with the assent of the corporation; therefore it can be shewn that the corporation could not give such assent, unless by instrument under seal, although the whole of the act of tearing off the name and seal were done *bona fide*, yet being without the legal assent of the bank in the only way it could have been given, the action is tortious, and therefore this action substantiated. The case *Taylor v. Dulwich Hospital*, 1 P. Williams, 656, shews this was an act the president and directors could not do at all, and certainly not unless under seal. In that case the Lord Chancellor says, "for a contract to bind that or any corporation as to its revenue, must be under seal," and the act of cancelling this bond related to the revenue of the bank. If the president and directors told the cashier to burn this bond, and he were to do so, an action of trespass would lie against him, in favour of the bank.

The cancelling is an act of the mind, and the mind of the corporation can only be shewn under seal (a). A corporation cannot make a surrender of a lease (b). It must act by attorney. The bond in this case was not cancelled by the defendant in his capacity of corporator. A corporation must authorize an attorney to receive livery of seisin, because it is a personal act, and if a corporation receive rent from an assignee it must be by warrant of attorney to discharge the original lessee (c). So in this case the delivery of the bond to be

(a) Black. Rep. 1044; 1 Bronlow on Corporations, 54.

(b) Kid on Corporations, 265.

(c) 2 Saunders, 305.



cancelled, to be legal, should have been by warrant of attorney. If a grant of an acre of waste be made to a corporation without specifying the acre, the corporation must make their election under the common seal (*a*). An attornment of tenant cannot be made by a corporation without seal (*b*). The effect may have been different if the president had cancelled the bond. [C. JUSTICE.—His doing it could certainly have no other effect than if he were present and assented to it.] An answer to a bill in chancery must be under seal by a corporation (*c*). The principal matters on this point will be found well arranged in *Kid on Corporations*, and show very conclusively that the cancelling of this bond could not have been assented to by the corporation, unless through the medium of the seal.

There was no evidence in this case even of the assent of the majority of the whole of the directors, or even of the majority of seven. In *Kid on Corporations*, it is said "every corporate act must be done in a corporate assembly." But the cashier proved, that in the present case he looked on this act as that of the individual directors, and did not enter it in a book, as all the acts of the president and directors were entered. If the boundaries set by the law as between corporations and private persons be destroyed, very injurious results will arrive to the members. There is not a single case to be found, in which the doctrine held up by the defendant is sustained.

The instrument is not cancelled; it was an error in thinking that it was; the old doctrine would have sustained the opinion that it was destroyed; but the instrument not being destroyed does not militate against this action, as a conversion is clearly proved; the shaving of a horse's tail has been held a conversion, and there can be no question from all the cases on the subject, that the evidence sustains at least the third count.

If this action could have been sustained five hundred years ago it can now; no relaxation in the judgments of the courts can destroy the plaintiffs right of action (*d*).

The court gave judgment in this term.

(*a*) 3 Leon. 30.

(*c*) *Kid on Corporations*, 269; 1 Leon. 30

(*b*) Carter 16, 17.

(*a*) Cro. El. 626; 4 T. R. 339.

ROBINSON, C. J.—This is a case of consequence to the parties, from the amount it involves; it presents several questions out of the ordinary course, and which, after the discussion and consideration they have received from us, seem to me at least to be attended with some difficulty.

By a provincial statute passed in 1821, a company of persons was incorporated to carry on the business of banking, under the name of the President, Directors and Company of the Bank of Upper Canada. They were authorized to have a common seal, and to hold a joint transferable stock to the amount of 200,000*l.*, which was limited by a subsequent act to 100,000*l.*, and it is expressed in this charter that they may issue bills or notes, (none to be for a less sum than five shillings,) which shall be signed by the president, and countersigned by the cashier and treasurer, and which shall be binding upon the corporation though not under the corporate seal. It is further expressed in the statute, that nothing therein contained shall be construed to prevent the corporation from dealing in bonds, bills of exchange, or promissory notes, or in buying or selling bullion, gold or silver. I recite these provisions merely to shew the nature and object of the corporation, they have no immediate bearing upon the questions raised. By the eighth section of the statute, it is provided that the directors for the time being, or a major part of them, shall have power to make and subscribe such rules and regulations as to them shall appear needful and proper, touching the management and disposition of the stock, property, estate and effects of the said corporation, and touching the duties and conduct of the officers, clerks, and servants employed therein, and all such other matters as appertain to the business of a bank, and shall also have power to appoint as many officers, clerks, and servants for carrying on the said business, and with such salaries and allowances, as to them shall seem meet; provided that such rules and regulations be not repugnant to the laws of this Province.

By the eighteenth section it is provided, that every cashier and clerk, before he enters into the duties of his office, shall give bond with two or more sureties, in such sum as may be satisfactory to the directors, with condition for the faithful discharge of his duty.

By the twentieth section it is provided, that seven directors shall constitute a board for the transaction of business, of whom the president shall be one, except in the case of sickness or absence, when the directors may chose a chairman for such meeting.

By the twenty-first section it is provided, that branches of the bank may be authorised by the directors, or a majority of them, in any other part of the Province, under such rules and regulations as the directors or the major part of them may think proper, and not repugnant to the general rules of the said corporation.

By the twenty-third section it is provided, that it shall be the duty of the president and cashier of the said bank for the time being, to make a return under oath to the provincial Parliament, once in each year if required by either house, which return shall contain a full and true account of the funds and property of the said bank, the amount of its capital stock subscribed and paid, the amount of the debts due to and from the said bank, the amount of the bills and notes emitted by the said bank in circulation, and the amount of specie in the said bank at the time of making such return.

These clauses are extracted in order to shew what are the powers and duties of the directors ; the eighteenth clause is that which has the most immediate and particular reference to the subject matter of this action. The following facts out of which the action has arisen are undisputed :

Soon after the act was passed, the corporation commenced operations under their charter and have continued from that time to carry on the business of banking. About the year 1822, Mr. Francis Ridout was appointed by the directors to the office of discount clerk, on which occasion he gave a bond for the faithful discharge of his duties, as the eighteenth section of the act requires. Four persons entered with Francis Ridout into this bond as his sureties, each binding himself severally in the sum of 1000*l.*, not jointly with the others, nor jointly and severally, but severally. The defendant in this cause was one of the sureties ; the others were George Crookshank, Esq., the Rev. John Strachan, and Samuel Ridout, Esq. Francis Ridout continued in the office of



discount clerk from that time, and in July or August, 1830, it was agreed by the directors that he should be placed in the office of second teller, which was considered to be a promotion in point of station, though the emolument was to be the same; the situation of second teller was only then created, having been rendered necessary by the increased business of the bank. It was required of Francis Ridout, before he should enter upon the duties of second teller, that he should give a bond with sureties for the faithful discharge of his duty, and he did accordingly furnish a bond executed by the same four sureties that were obligors in the first, in the same amount as to each respectively, and in the same terms, except that the office to which it related was different. This bond was delivered to the directors, and deposited with and kept by the president. Not long after this new security was given, it was discovered that Francis Ridout had misconducted himself in his first office of discount clerk, so as to occasion loss to the bank equal to or greater than the penalty of 1000*l.* in which each security was bound.

As to these facts there is no question, and before proceeding to notice those other facts and circumstances which from their peculiarity, and their less positive character, have given rise to the questions to be now disposed of, I will proceed to state what is the nature of the action to which the evidence of those facts and circumstances is to be applied.

It is a special action on the case, by the corporation against the defendant, for tearing his seal off the first bond, in which he became surety in 1000*l.* that Francis Ridout should faithfully discharge the duties of discount clerk; with a common count in trover.

The defendant not denying that he did the act complained of, contends that he did it with the assent of the president and directors, and that he is therefore not liable in this action.

From the unusual nature of the circumstances, I will recapitulate all the evidence, first premising what I think it is very material to consider, that no dishonorable collusion between the defendant and the cashier or any other person belonging to the bank, was attempted to be proved, nor was it imputed to the defendant that he contemplated any thing



fraudulent or improper in what he did, on the contrary any idea of that kind was expressly disclaimed ; and on the other hand, it was not attempted to be proved against the president and directors, and was not insinuated, that they had acted from any motive or intention injurious to the other stockholders, or that they had designedly abused their power. [Here his Lordship stated the evidence as above from the notes taken at the trial.] Upon this evidence the argument has taken a wide range, and the case is such as fully to justify the anxiety with which the several points have been contended on both sides ; several of the questions are new, and are rather to be determined on principles and reasoning, than by adjudged cases, and they are of that description that opposite opinions may be very sincerely entertained upon them by the respective litigants. The cause was tried before me, and as the several questions arose, I was necessarily governed by the opinions which I could form at the moment ; upon the accuracy of those opinions I could place but little confidence, and if after the examination I have since made, I should be in error in adhering to any of these first impressions, it is fortunate that my brothers have to apply their judgments to the same questions, free from that leaning which perhaps most persons feel in some degree towards the opinions they have first taken up, however hastily they may have been formed.

The plaintiffs have moved for a new trial ; first, on the ground of misdirection ; second, because illegal evidence was received ; third, on the ground of surprise.

As to the misdirection, the jury were told, [The Chief Justice here read the charge to the jury as above stated].

Whether the direction was proper, and whether the verdict is legal upon the evidence given, turns I think upon these points :

1st. Could the president and directors in any manner (that is by any act or formality) consent to deliver up to the defendant his bond, in order to its being cancelled by him, so as to make such delivery and cancelling by consent, effectual for his discharge.

2ndly. If they could in any manner do this, would their

assent at the board, that the defendant should take back his bond and cancel it, be sufficient, though not expressed in any instrument under seal or in writing, nor recorded in any minute or resolution of the directors.

3rdly. If so, was there evidence before the jury sufficient in law to warrant their finding such assent.

Upon the first point I am of opinion, that it was within the power of the directors to discharge the defendant from his obligation by executing an instrument conveying their assent that he should cancel it, which with his cancellation would make it void.

This has been questioned in argument, but I can see no plain principle of law on which it can be doubted. In the first place, I assume that in ordinary cases an obligee can discharge an obligor by giving up his bond to him to be cancelled, and that the obligor tearing off his seal with the assent of the obligee, has the effect of cancelling the instrument. This is repeated in numerous authorities, and Shepherd's Touchstone is cited in support of it; it follows indeed from plain principles of law. There is certainly a distinction in cases where a real interest has passed and become vested under a deed; there the bare cancelling the deed will not divest the interest or estate; that will remain though the grant or lease be destroyed; but with respect to a bond the position is clear, that by a cancelling with mutual assent, all remedy upon it or in respect of it is lost; even where the obligor had without assent torn off his seal, it seems in early times to have been holden that the bond would by such destruction of the seal have been made void, but it is not so holden at this day. It is sufficient on this point to refer to *Read v. Brookman* (a), and the cases cited in the note. On the other hand it is equally clear, that the cancelling the bond by mutual consent does annul the bond and destroy all remedy upon it. As to any remedy by another form of action for the destruction, where such destruction has proceeded from the assent of both parties, that is of course out of the question, for *volenti non fit*

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(a) 3 T. R. 153.

*injuria*. It is assumed, therefore, that in common cases, upon a cancelling by mutual assent, all right of the obligee upon or in respect of the bond is extinguished.

# THE UPPER CANADA JURIST.

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## UPPER CANADA KING'S BENCH REPORTS.

OLD SERIES.

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### BANK OF UPPER CANADA V. WIDMER.

Then is there any legal principle upon which we can deny that this corporation as obligees in this bond, or rather the directors on behalf of the corporation, could by any act or formality of theirs, effectually consent to make this bond void, by delivering it up to the obligors to be cancelled. I can conceive none. I look upon the directors as fully authorised to act for and in the name of the whole corporation, and to do whatever the whole of the stockholders could do, unless the charter in any particular point restrains them. Now as to their charter, it is expressly enacted that "the stock, *property, affairs and concerns* of the corporation, shall be managed and conducted by fifteen directors, to be elected by the stockholders, and that seven of these directors shall form a quorum." There cannot be more comprehensive words, and though there is one point in which they are restrained, namely the issuing bills to more than three times the amount paid in, still, although the directors are made personally responsible if they transgress this legislative restriction, the corporation are nevertheless bound by their acts, though in opposition to their charter, and must pay the bills thus improperly issued. The act expressly declares this, and for the protection of those who deal with the bank or in their paper, it is necessary it should be so, and I conceive it would be so if the act had been silent on that point. Indeed, when we consider the objects of this trading corporation, established merely for transactions of a mercantile nature, it is evident that for the



preservation of good faith in their dealings, to give confidence in them, and to facilitate their daily business, it is indispensable that the directors should fully represent, and be able to bind the stockholders in all cases not otherwise provided for by the charter, and this as well where their acts may tend to the prejudice of the company, as where they result in their advantage. If there is any thing in the nature of the act which they assume to do, which takes it out of the scope of their authority, that I think must be plainly shewn, and traced either to some established maxim or principle of law, or to some restriction in their charter.

Thus much might be said perhaps of any agent acting upon a general and unrestricted authority, though not coupled with an interest; but I look upon the directors of this banking institution, as standing in a different light, and though nothing may turn upon the distinction, it is impossible not to admit that they are acting under different circumstances from the committees of charitable institutions, or the managers (by whatever name they may be called) of many other corporations. These directors are members of an association trading together for their joint profit; they hold an interest, and are required indeed to hold a considerable interest in the common stock; they are in effect the managing partners of the company, selected by the rest to represent the whole; with respect to the other stockholders they are as trustees; with respect to other persons they are the bank. If the whole were associated for the same purposes without a charter, there can be no doubt that the act of any one partner, where there was no fraudulent collusion, (a distinction I desire always to keep in view,) would be binding in law upon the whole, notwithstanding it might be very injurious to the common interest. In order to give them certain privileges, and the public certain securities, and to get over a disability which then existed (under the acts commonly called the Bubble Acts) of creating companies with a transferable stock otherwise than by the authority of the Legislature, the act was passed which constituted their charter. So far as any thing contained in that act has the effect of altering the general principles of law, which make

the acts of one or more partners binding on the rest, we must of course make the exception, but in other respects it seems to me that these general principles must apply ; and besides there is the express and comprehensive authority conferred upon the directors, by the eighth section of the act itself.

We must consider then what are the peculiarities of this case. It was noticed in argument, that the government are authorised by the act to hold stock in the bank ; that they do hold stock to a large amount, and that the public therefore has a deep interest in the safety of the institution, and in the correct conduct of the directors. That is true in fact, but I do not see that any consequence follows from it that can control the rules of law. The government by taking stock become partners in this association, under the same charter and upon the same footing as other stockholders ; their stock is represented by a certain number of directors chosen by themselves ; and any act of the board is the act of persons representing the government, as well as others holding stock in the bank. If the directors were to make an improvident loan, accept a bill in an injudicious way, or do any other injurious act, it is clear they could not escape from the consequences by urging its prejudicial effects upon the government, and if any act of theirs can be disavowed by the stockholders, it must be from the particular nature of the act itself. It was also urged in argument, and is a weighty consideration, that the legislature in their act provide "that every clerk before he enters on his office, shall give bond with two or more sureties in such sum as shall be satisfactory to the directors, with condition for the faithful discharge of his duty," and I think it is not without great reason contended, that that condition was prescribed not merely for the protection of the interests of the company (in which case they could more readily dispense with it), but for the protection of the public at large, who were to hold the bills of the bank about to become the principal circulating medium of the country, and who were therefore deeply concerned in its safety. But after considering this in the strongest light, I do not see that it can be made the ground of a decision against the general rule of law.

Even with respect to the taking this very security, such a discretion is expressly vested in the directors as shews a confidence and authority in effect unlimited ; they are to take the security in such sum as may be satisfactory to them (the directors). Instead of a bond with four securities in 1000*l.* each, they might have taken a bond with only two sureties, or with three in 5*l.* each, or five shillings ; and certainly they might have waived the requiring of the present defendant, or of any fourth security, as a party to this bond. At any rate I cannot regard this provision as any thing more than a direction to the directors, which if they did not observe, they would be liable in equity for an abuse of their trust, and might be found also to be liable in law to the other stockholders, but the clerk so appointed and employed by them would nevertheless be to all purposes their officer, and they would be bound by his acts within his department of service.

But then the directors here, or rather their predecessors, have taken a proper security, and it is said they cannot release it or any part of it. I don't know on what ground this can be said in a court of law. The bond when taken, and every thing connected with it, becomes part (as it appears to me) of the "property, affairs, and concerns of the corporation," which the directors are authorised "to manage and conduct." If they had put it in suit, I think they would have had power to release the action, or to enter a *nolle prosequi*, or to conclude themselves by admitting the truth of any fact pleaded in bar, or to acknowledge satisfaction ; and I can give no reason why they might not release the bond or surrender it to be cancelled. If they cannot no body else could, and there might be strong reasons imagined, why in equity and under special circumstances the obligee might claim to be discharged. On many occasions the king is to take security from public officers for the faithful discharge of their duty. The public interest is directly concerned in those securities, but we cannot say that the king cannot therefore release such obligors or surrender their bonds to be cancelled.

It was argued, that the directors, by thus extinguishing an important security belonging to the bank, would in fact be committing a breach of trust, and that so flagrant as to render

themselves personally liable to the other stockholders in equity at least for the losses they might sustain. If this were inevitably true, it is not in my apprehension any argument to shew that their act would be ineffectual in law, but rather the reverse. It is their having done what they desired to do, and on account of the loss which others have thereby sustained, that they are held to be liable. In the plainest cases of violation of trust the act may be effectual in law, and the redress is a remedy against the trustee, as where a trustee of an estate alienates the property.

It is hardly necessary to cite authorities for this. In Com. Dig. Chancery, 4, W. 5, it is said "If a man acts contrary to his trust he shall be decreed to make satisfaction; as if there are articles between A. and B. to make a jointure on the wife of A., and by importunity B. releases his covenant and delivers up the articles to A., he shall make a recompense to the wife and the children of the marriage, for his breach of trust."

"If a trustee in a recognizance releases the recognizance, he shall pay the principal and interest if it does not exceed the penalty."—*Ibid* and *Irvan v. Bush*, 1 Vernon, 343.

"If a judgment be to A. for the security of articles for making a jointure, and A. by corruption acknowledges satisfaction, whereby the jointure is defeated, A. shall make good to the wife all her damage, yet if A. had a colour to do it, and did not act by corruption, he shall only pay costs."—*Ibid*, and 2 Vernon, 619.

Consider also the case of Executors and Administrators; the latter especially have not always a beneficial interest in the estate, and yet they may undoubtedly release securities or compound debts, and whatever they do in this way will be effectual, however much it may prejudice the interests of persons entitled to share in the estate.

In such cases, so far as courts of law are concerned, we must admit the maxim "*fieri non debuit, sed factum valet*," unless indeed it can be shewn that both parties acted corruptly and *mala fide*, and then, even in courts of law, it will generally be found that the party claiming to be discharged will be successfully resisted, upon the honest principle, that



no party shall avail himself of his own fraud to charge another or to discharge himself.

Viewing the directors as persons in the execution of a public trust, the case of the Charitable Corporation v. Sutton and others may be thought to be material, and I believe it was cited on the argument; it is a remarkable case, and well deserves to be referred to in the discussion of the present question, but I can gather no authority from it for saying that the directors here could not release the defendant from his obligation. In that case, there was a gross and shameful conspiracy on the part of many of the trustees and officers of that charitable corporation, by which they succeeded in defrauding the corporation to the amount of 350,000*l*. The whole contrivance is treated of and exposed by Lord Hardwicke as a palpable fraud; it was indeed so flagrant that it engaged the attention of parliament, and ended in the deserved disgrace of those concerned in it. But in the first place, no question arose in that case upon the validity in law of any act done by the trustees, whether fraudulent or not fraudulent; the point in issue was, whether any, and which of the defendants, could by the salutary power of the chancellor be made responsible *in equity* for the losses occasioned by their misconduct; and Lord Hardwicke in his judgment holds language strongly tending to shew, that even in equity and upon the question of indemnification, it is not every improper or imprudent act which is to be treated as a breach of trust. In a more modern case, making false entries in the books of the corporation was held to make those who were guilty personally responsible; but the question of their responsibility is quite apart from the present enquiry, and upon the whole, I know not on what principle we could say that if the directors of this bank, by an instrument executed under the corporate seal, had expressed their assent to the defendant's cancelling his bond, such assent would not bind them and render the cancelling effectual in a court of law; I know not why they might not, if they suspected nothing wrong, and meant nothing wrong, release one of four sureties from an obligation into which it never was necessary that more than two should have entered.

A consideration presents itself here, which is not exclusively applicable to this part of the case ; having stated it once, however, it will be unnecessary to advert to it again. It was contended in the argument for the plaintiffs, that there was no consideration for this pretended assent on their part ; and although it was not urged or intimated, that there was any imposition or contrivance, still it was insisted that the want of any adequate consideration or motive rendered the act void. Now in respect to the necessity for a consideration as a barely legal question, I do not see on what the objection is to rest. The corporation, as well as an individual, could without a consideration release an obligation under seal ; any trustee could do it ; and in law, if there was no fraud, the act would be valid. Then as to this mode of releasing a party by cancelling the instrument, it seems plain that the want of consideration cannot affect it. When a seal is torn off from a bond it is *prima facie* void, and the obligee has lost his action. If, however, he can shew that the obligor was the person who cancelled it, and that he did it of his own wrong, then I take it to be now clear, though it may not always have been so, that the act will be considered as not done, and the bond will be treated as subsisting, the special fact exempting the plaintiff from the necessity of a profert. If, however, the obligee has assented to the cancelling by the obligor, he can certainly not place his case on this footing, because he cannot shew that the obligee tore off the seal without his assent and wrongfully ; what his inducement was for assenting is not, I think, material, so long as he did assent, and was not misled by the fraud of the obligor.

I have found nothing to support the other view of this subject ; but I imagine it was not so much intended to insist upon the want of consideration as making the act void in the ordinary and strict legal ground, as to shew from that it was a highly improbable and absurd supposition, that the directors ever could have assented to an act so manifestly injurious without some rational motive ; and that if they did, it was so flagrant and wanton an abuse of their trust, as to make their act insignificant, and one, that in justice to the bank, the court cannot and ought not to recognize. As legal arguments,

there is I think no force in these positions ; the first is very proper to have been addressed to the jury as throwing doubts and suspicions upon the truth of the defence ; it might shew the assent of the directors to be improbable, but could not shew it to be impossible ; that must depend on the proof of what actually did take place. As to the second argument, that an assent under the circumstances of this case would be a wanton breach of trust, I have before stated my opinion that that does not necessarily affect the legal validity of the act. It is the common case with all trusts, and the general principle is, that the relief is in equity, not that the abuse cannot be perfected in law.

But though I fully agree with the Attorney-General, that the discharge of this security, for any reason that was given, would have been an exceedingly imprudent and an irregular act, and I remarked upon this to the jury, and pointed out that it would have been imprudent and irregular, and out of the course of such transactions ; still I cannot go so far as to say that it was such an act as to be almost incredible, or that it must necessarily argue culpable intention, or a criminal indifference to the interests of the bank.

From the whole complexion of the case I receive this impression : this young gentleman, the discount clerk, had been going on several years in the regular discharge of a duty which probably did not give him the custody of cash, and in which therefore he could scarcely have injured the bank, except by some deliberate and very wicked contrivance, out of the common course of embezzlement ; nothing of the kind seems to have been suspected, or was likely to have been suspected by any person. An occasion arose for placing him in another and higher situation. If it was true, as a witness proved, that the proposition to place him in this new situation was the voluntary act of the directors, it shews that they had every confidence that up to that time all was right.

It is further proved, not positively, but according to the best of a witness's belief, that when the clerk was told in the directors' room that he must find securities for this new office, as the other bond did not relate to it, and when he stated his apprehension that he should have difficulty in find-



ing them, it was suggested to him that his former sureties would have no objection to continue responsible for him, and that if they entered into new securities for the new office, the old would be given up to them. If this ever took place, it is of course very important; if it did not, then it is at any rate certain, that when the new bond was taken to defendant to execute, he did openly and peremptorily refuse to sign it on any other terms than that he was to have back the other; I do not mean that he thus expressed himself in the presence of the directors, I only mean that he shewed unequivocally that he intended that, and nothing else. There was nothing strange or unreasonable in the defendant's objection; of course he had no right to ask or expect that his old bond should be given up to him, but when asked to sign another in an equal sum, he had a perfect right to say he would not unless the first were cancelled. He might be willing to become guarantee to the amount of 1000*l.*, but refuse decidedly to answer for a larger sum. If this objection had been discussed between him and the directors, and they had acted with due circumspection, feeling it their indispensable duty to be prepared for the worst, they might have replied, that the new bond would afford no security for past transactions, that although they feared nothing, they could not part with the security, and that if defendant would not become security for any thing further, Mr. F. Ridout must find some other person who would, or he could not obtain the situation. Both parties I think had this option to exercise. It is affirmed by the defendant that he persevered in his objection, and that the directors never hesitated on their part to give way to it; if they had duly reflected, I do not think that they, or any other men of business, would have taken that course; they might, to be sure, to overcome a difficulty, have released one of four securities, but evidence is adduced to shew that they assented that the first bond should be wholly given up on the same parties entering into the second. This was not prudent, or like men of business; but I can readily conceive an individual, with no want of attention to his own interest, re-



laxing quite as far to meet the wishes and promote the views of a person in whom he had confidence from long experience.

Secondly, admitting that the president and directors could, by the most solemn and general mode of declaring their will, have agreed to give up this bond to be cancelled, and that an assent so expressed would have bound them, it is necessary next to enquire whether their assent at the board, that the defendant should take back his bond and cancel it, can be received as sufficient, although not expressed in any instrument under seal, or in writing, nor recorded in any minute or resolution of the directors.

This is a wholly distinct question, and of course every thing depends on it, because it is clear that in this case there was no proof but of a verbal or an implied assent, and it is contended that the evidence did not even establish that. For the present purpose we will assume that it did, and consider whether that would suffice; when we look into the early authorities on the powers of corporations, and the manner of exercising them, we find it very strictly laid down that they can only act by deed under their seal; when we look a little further we find exceptions gaining ground, at first very trifling, and afterwards more important, all proceeding from a gradual extension of the principles of the common law, as new subjects arose for their application, and not from legislative provisions. It is impossible it could be otherwise; it would be as reasonable to insist that the dress of an infant should fit a grown-up man, as that a set of maxims and principles could have been framed two or three hundred years ago, which without any modification would suit the present circumstances of mankind. It would be infinite to attempt to qualify and mould them by an act of parliament, as each new combination of facts arose; reason and experience have had their gradual effect, and of themselves have led to great changes in many departments of the law. In a point incidentally connected with this case. the effect of tearing a seal from a bond, and with respect generally to alterations and erasures of written instruments, we find much very positively laid down in the reports that is not law at this day; the change in this respect is remarked and accounted

for by Mr. Justice Buller, in the case of *Master v. Miller*, 4 T. R. 332.

The corporations that existed in very early times, were for the most part of a nature and for purposes wholly different from those which belong to banking institutions. A Dean and Chapter, or a Mayor and Burgess, might answer all the objects of their charter without feeling inconvenience from the application of rules and principles, under which a bank would find it impracticable to move.

In *Com. Dt. Franchise*, F. 13, it is laid down broadly, "a corporation aggregate can do nothing but by deed under the common seal." The modern editor of the work, however, aware of the numerous relaxations of this rule, interprets it thus in a note, "That is, no act in which their *real property* is concerned or by which their rights are to be asserted," alluding in the last expression to those cases which respect the authority to enter for a condition broken, to seize goods as forfeited, and the like.

So it is laid down that a corporation cannot be a trespasser, and that it cannot be sued in *assumpsit*, which we know to be very differently held at this day.

There were indeed very early relaxations of the rule, that no corporation can do nothing but by deed under their seal but they were confined to trifling acts. It was said a corporation might retain (that is, hire) a servant, a cook, a butler, without deed; so it may authorize another to drive cattle, kindle a fire, &c.; so it may authorize one to make a distress, for this it is said does not vest or divest any interest.

As corporations increased, and their objects engaged them more in the active business of the world, the exceptions multiplied and became more important. In the *King v. Bigg (a)*, it was admitted that the Bank of England might without deed empower their servants to make promissory notes or bills of exchange in their name. Next we find corporations accepting bills of exchange; a very important act certainly, and one that may "*affect their interests*" even to their utter ruin.—*Edie et al. v. East India Company (b)*; *Broughton v. Manchester Water-Works Company (c)*; it is expressly deter-

(a) 3 P. W. 419.

(b) 2 Burr. 1216.  
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(c) 3 B. &amp; Ald. 7

mined that a corporation may accept bills of exchange without deed, and in point of fact it is known that all trading companies do accept and endorse bills like individuals.

It is said in *Com. Dt. Franchise*, that a corporation with its head may give a personal command without attorney; and I have not yet found any dictum or case which leads me to conclude, that if at the board the directors ordered this bond to be given back to the defendant to be cancelled, that order would not have been sufficient without writing or seal, although of course no estate could be so divested; that would need other formalities.

I find that in a modern case it has even been decided that an agent of a corporation, acting by verbal direction of a committee, may render the corporation liable in trover, an entire departure from ancient maxims in more than one respect.—*Duncan and another v. Surry Chapel Company*, 2 Starkie's Cases, 50. The following cases, in my opinion, shew the relaxations I am speaking of very strongly; *Mayor and Burgesses of Stratford v. Till*, 4 Bing. 74; *London Gas Light Company v. Nichols*, 2 Carrington and Payne, 365; *De Gran v. Mayor and Corporation of Monmouth*, 4 Carr. & Payne, 111; *Yarborough and others v. The Bank of England*, 16 E. 6; *The King v. The Inhabitants of Chipping Norton*, 5 E. 239; *Derby Canal Company v. Wilmot*, 9 T. R. 360; *Dean and Chapter of Rochester v. Pierce*, 1 Campbell, 466; and *Wood v. Tate*, 2 N. R. 249. The two last cases in particular, I think, are in favour of giving effect to a verbal direction or assent of the corporation in a matter like that before us. In the case 1 Camp. 466, the defendant, without any demise by deed, had occupied a cottage belonging to the Dean and Chapter of Rochester; they brought use and occupation, averring that the defendant by permission of the Dean and Chapter had occupied, &c. *Lawes*, for the defendant, objected that *assumpsit* for use and occupation could not be maintained by a corporation aggregate, as they could only demise by deed. Lord Ellenborough answers, "A corporation cannot demise except by deed, but "the action for use and occupation does not necessarily suppose any demise. It is enough that the defendant used



"and occupied the premises by the permission of the plaintiff; and a corporation as well as an individual may without deed permit a person to use and occupy premises of which they are seized." The judges were unanimously of that opinion in term, and this objection was abandoned in the argument.

In the case in 2 N. R. 247, the corporation of the borough of Morpeth had designed to execute a lease to one Wood, of a house and land for twenty-one years, which of course no individual could do without writing. Instead of executing this lease in the name of the corporation, and under their seal, it was signed and sealed by some of the bailiffs and aldermen under their own seals, and in their own names. Distress was made by the corporation for six months' rent in arrear, and replevin was brought, and the distress contended against, on the ground that the lease not being a valid lease from the corporation, they had not demised and therefore could not distrain. Sir James Mansfield said, "I can only consider this to have been intended to be a corporation lease of corporation lands to the plaintiff, and to have been executed in a blundering manner. The plaintiff has entered and paid his rent from time to time to the bailiffs of the borough, who are the proper persons to receive it. The lease then being void in consequence of the blunder, is not the plaintiff tenant from year to year, and half a year's rent being now due, have not the corporation a right to distrain for that rent?"

Now in both these cases, though they regard an interest in real estate, the corporation were recognized as having *permitted* persons to occupy their lands in the one case verbally, in the other by a writing not properly executed, and not sealed by their seal; they were therefore taken in both cases to have expressed their will without deed under their seal, and in consequence were allowed to sue for rent in the former case, and to distrain in the latter, in which too their permission is regarded as having "*created a tenancy from year to year.*"

I cannot conceive that the courts which decided these cases, would have allowed the corporation to bring trespass against



the occupants ; they would surely have said that the occupation was by their permission, and "*volenti non fit injuria*" If they are allowed to derive rights to recompense in consequence of their verbal permission, they surely could never be allowed to turn round when it suited them in other cases, and treat other parties as wrong-doers, on the principle that expressions of their will, not under seal, were not binding upon them. Then if they could not in such cases, I do not see that this corporation can in the present case—confining the question to the single point, that here is no evidence of their assent in writing and under seal.

In 5 E. R. 239, is a case in which it is decided that a corporation cannot demise tolls without deed ; but neither could an individual, and indeed several of the cases in which the necessity of a deed is allowed, are of the same description, and therefore not to the purpose.

After all I have met with on this point, I should be at a loss to say what are the acts which a corporation like this can not do without deed under seal, unless it be the divesting themselves of some interest, for which purpose a deed would in other cases be necessary, or the binding themselves by an executory agreement. The distinction between their liability upon acts done and services accepted, and their liability upon executory contracts, is plainly marked in several of the cases I have stated. So here, if the defendant were barely to allege an agreement on the part of the corporation, that on condition of his doing a certain act, they would release his bond, such an agreement must be shewn under their seal, or it would be nugatory ; that I think is very certain ; but if they hand him over his bond, and tell him he may cancel it, or tell their cashier to do it, and he does it, the act is perfected, their will is carried into effect, and if it does not annul the bond, it is not for the want of an instrument under seal, but for some other reason.

As to their being no minute or record of their assent in the proceedings of the board, I doubt whether any thing has been found that can appear to sustain an objection on that score. Recording their own proceedings, it is an act wholly within their own power and discretion, and third persons

would be very insecure in their transactions with them, if their minuting down what they did were necessary to make it valid.

If the bank accepts a bill, they are liable whether they preserve a minute of it or not ; and so I think would the directors disable themselves from bringing trover for a note, if they had called in the maker and given it up to him, upon his substituting that of another person, although they had expressed nothing under their seal, and had made no minute of the proceeding. And though I may be much in error, I certainly cannot but think that if a debtor of the bank had even given them a mortgage, and afterwards, he being present at the board, the directors had expressed their willingness to relinquish it upon any other prospect being held out to them, and had consented to his destroying his seal in their presence, I cannot, I say, but think that whatever might be held as to the estate remaining vested, and their consequent right to turn him out in opposition to justice, they could not treat him as a wrong-doer in trespass or trover for cancelling the deed, or in other words for doing what they told him he might do.

It has always been with me a difficulty in this case, to comprehend how trover can be brought, unless by denying the fact of assent ; there is no demand and refusal to rely on, the circumstances do not admit of it. The mere act of destruction, therefore, must be the sole title to this remedy ; if that was assented to, it was not tortious ; and it is extraordinary, I think, to suppose that the plaintiffs would be allowed to say, we assented to what you did, but we did not assent under seal, therefore not only is the bond still in force, but we will hold you a trespasser, and claim heavy damages for an act done by you in perfect good faith, and with no injurious intention. The directors could not convey the building in which they sit without a deed under seal, but if they were to desire a person to break all the doors and windows, I have no idea that they could recover heavy damages against him for the act.

Upon the *third point*, whether there was evidence before the jury sufficient in law to warrant their finding an assent on the part of the directors, supposing that an assent under seal or in writing was not indispensable ?

It would be tedious to reason this point minutely. I have recapitulated all the evidence; its sufficiency to carry conviction to the mind might be admitted by some, and questioned or denied by others. The jury being left by me perfectly at large in that respect, came quickly to the conclusion that it was sufficient, and declared their conviction expressly.

The cause is one of consequence; the evidence circumstantial, and depended much on inference. If the court were asked to grant a new trial on the merits of the case, it would be necessary to weigh it, as the jury were bound to weigh it; and we might after such an inquiry find it just to allow a revision by another jury. But that is not now the point to be considered; it is contended that the jury had *no evidence* before them on which they could find an assent; however doubtful I might think the fact, I cannot go so far. The evidence of the cashier was conscientious and candid, he fully admits that he had no direction to give up the bond, that it was his own act in compliance with the defendant's request. But, on the other hand, it was undoubtedly proved that before this was done, it was openly said at the board, (and as witness thinks by the president,) that on furnishing the new bond, the obligors should be allowed to take up the old one. It was proved further, that before the board and not secretly, this old bond was asked for, for the declared purpose of taking off the seal of another obligor, which was openly done in the presence of the directors, no one objecting then or afterwards; that this bond, thus cancelled as to the defendant and another obligor, was placed again before the president, and remained in his custody. Facts are sometimes inferred, not merely from the positive proof of them, but from the total absence of contradictory evidence, which it would seem easy to bring, if the truth were otherwise. So here a fortnight elapsed, during which no one is shewn ever to have remonstrated against the cancelling as having been improperly done. No proof by the cashier that the president or any director interrogated him on the subject, or expressed surprise or displeasure. After a time it was found out, contrary to the expectation of all, that the clerk had committed great breaches of trust; and then the cashier swears that he



heard some of the directors say they were sorry the bond had been cancelled, but not that they imputed to the defendant surreptitious or dishonorable conduct. There were other circumstances also, to lead to the conviction that the defendant always meant, and openly said, that he would never sign a new bond unless he got up the other.

If we can in this case legally enquire whether the mind of the directors was assenting, I cannot but say that the jury had evidence before them, which I was bound to allow them to weigh and to decide upon. The bond was delivered to the defendant by the cashier expressly to be cancelled. The cashier is an agent of the bank, and a very important agent; I can hardly say to what bounds his duties are restricted; that was not in proof, the bond it was said was usually kept by the president. If, as an agent, he did an act honestly in intention, but beyond the general scope of his authority, the subsequent assent of his principals would make that act their own by adoption. But there is some evidence of assent both before and after; an assent need not be expressed, it may be implied, and this in cases criminal and civil. The assent of an executor to a legacy may be implied various ways; there are many authorities to that effect. Prisoners have been often convicted upon assertions of the circumstances of their guilt made in their presence, which they have not denied, or attempted to repel; at least such tacit admissions have borne strongly against them. And if instead of a board of directors assembled on business, these had been a company of persons suspected of being assembled on some illegal design, and it were proved that a person had come in and openly avowed his intention of committing a certain act of violence, if he could depend on their support, I cannot doubt that upon a prosecution for conspiracy, that evidence coupled with their acquiescence would be thought material to prove a combination.

I do not express an opinion that the evidence was satisfactory, but I cannot say it amounted to nothing; I think it was material, *direct* in some points, and even strong so far as it tended to prove an assent of the mind.



As to the ground that illegal evidence was received, that was given up in argument; I mean, it was not contended that Mr. Samuel Ridout, who was objected to at the trial as incompetent, and of whose competence I had expressed some doubts, was illegally admitted as a witness; as the objection is not insisted on, I make no remark upon it.

The last ground on which the new trial is moved is surprise. That is not made out in such a manner as could warrant us in setting aside the verdict.

The authorities referred to in argument, were cases in which a new fact had been given in evidence, which the adverse party could not have anticipated, because perhaps it was a mere invention of a perjured witness, or possibly a misapprehension of the truth by an honest witness. But here it was evident from the whole circumstances of the cause, that the plaintiffs well knew the defence that was intended to be urged, and all that can be said is, that it was not supposed a witness could be admitted who is now allowed to have been competent, or that he would have stated the circumstances into which both parties were enquiring, in the manner in which he did state them. I imagine there is scarcely a contested cause, in which one party or the other does not experience the kind of surprise I have last mentioned.

Upon the whole, I am of opinion against a new trial upon any of the grounds moved, but I have nevertheless formed this opinion with much diffidence, being well aware of the pains taken by my brother judges to form their judgments correctly, and I cannot but be sensible that it is most probable they have succeeded in coming to a right conclusion. As I do not, however, actually agree in their opinion, I am bound to deliver my own, and have felt it necessary to be thus particular in stating the grounds of it. It is scarcely necessary to repeat, that I am of course silent upon this motion as to the *weight* of evidence, or the propriety of a second trial on that ground, treating the case as an important one, and resting on evidence not directly satisfactory. The opinion of my brothers also on the points of law, render it unnecessary to look at the case in that view.

SHERWOOD, J.—This motion was made for a new trial on several grounds, but I shall only consider the two following: first, for the reception of improper evidence ; second, for misdirection. The part of the evidence objected to by the counsel for the plaintiffs is that which goes to establish the consent of the board of directors to the removal of the name and seal of the defendant from the bond. Before I examine the validity of this objection, I will endeavour to ascertain whether there is sufficient evidence to prove a conversion of the bond, supposing no testimony had been given in justification of the defendant's act. If the act of taking the bond with the intention of cancelling it was tortious, the cancelling it afterwards I think must be a conversion (*a*). It was intimated by the defendant's counsel that an action might still be brought on the bond by the plaintiffs, but I give no opinion on that point, because I think it would not affect the right of the plaintiffs to bring this action even if it were so. It appears by the evidence, that the board of directors gave no authority to the cashier to deliver the bond to the defendant to cancel, and I think he could acquire no authority from the bare possession of the obligation, to do so, because it was delivered to him for a special purpose, and therefore his authority as respected the disposal of the bond, was clearly circumscribed to the sole object of causing a copy of it to be made for the use of the board of directors (*b*). The president was the officer to whom the safe keeping of the bond for the use of the corporation was intrusted, and the cashier should have returned the obligation into the custody of the president, after he had performed the duty of making a copy ; the cashier distinctly stated at the trial, that he had not been directed by the board to give up the bond to be cancelled by the defendant, but he did so of his own accord, conceiving the step right after the new bond was signed. It therefore appears that no express authority to give up the bond was given to the cashier, either by parol or deed ; but it is contended by the defendant's counsel, that an implied authority was given by the board to

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(*a*) 3 Will. 33 ; 2 Saund. 47 ; B. N. P. 44.<sup>11</sup>

(*b*) 3 T. R. 757 ; Esp. Repts. 112 ; 4 B. & Al. 590.

warrant the cancellation. The expressions and conduct of the board of directors before the act of cancelling the bond, and their conduct after the act, are alleged to be sufficient to shew their consent. This allegation is met by the objection that no act of a corporation aggregate is valid, unless it be under the authority of the corporate seal. I will consider this objection before I dismiss the subject, but will first examine whether there was evidence of any implied parol consent of the board before the cancellation. The promise of giving up the old bond, when the new one was signed, was not made to the defendant, but to Francis Ridout, and therefore the promise if valid could not enure to the advantage of the defendant, nor could he claim any legal right under it to the possession of the bond for the purpose of cutting off his name and seal; such promise, I think, afforded no evidence of an implied consent of the board to the act of the defendant, even if such consent could at all support the validity of the defence. I therefore consider it useless to examine any further into the occurrences which happened before the board anterior to this last meeting, when the defendant asked for the bond to cut off the name and seal of Mr. Crookshank; that evidence was adduced to establish a tacit acquiescence on the part of the board to the latter cancellation, and from that fact to infer the full recognition and adoption of the prior cancellation, which related to the defendant himself. Admitting for a moment, for the sake of argument only, that such tacit recognition and adoption of the act would be sufficient in law to justify the defendant, still I think the evidence was insufficient to prove any recognition or adoption by the board; the same rule of law must necessarily be adopted here as in the case of individuals. When the existence of a debt or a particular right for instance has been asserted in the presence and hearing of one party, and he did not contradict it, such acquiescence and silence would amount *prima facie* to an admission of the debt or particular right claimed; so likewise an acquiescence and endurance when acts are done by another, which if wrongfully done are encroachments, and naturally call for resistance and opposition, are presumptive evidence of a tacit admission that such acts could not be

legally resisted (a). If the occupier of a house submits to a distress for rent, described in the formal notice of distress to be due from him as tenant of the distrainor, it is a tacit admission of the tenancy (b). If a party hold goods as a lien, but claims on another ground when they are demanded of him, he is precluded from setting up his right of lien afterwards (c). Many more cases might be cited, but I think one uniform principle runs through the whole of them, which is this, that the party who by his silence is presumed to make the admission must be fully acquainted with the right claimed by the other, or with the previous act or conduct of the other sought to be justified. In the present case, there is no evidence whatever to shew that the board of directors had any knowledge of the cashier giving the bond to the defendant to cut off his own name and seal, or that the defendant had ever done so. The cashier, it is true, laid the bond on the table, and the name and seal of the defendant were off, but it does not appear that the attention of the board generally, or of any one of its members, was drawn to the instrument at any time after the name and seal of the defendant had been cut off. There is no evidence that the defendant or any other person informed the board what had taken place, and therefore I think they must fairly be presumed to have been ignorant at that time of all the facts relative to the previous cancelling of the bond by the defendant. If you cannot presume a knowledge of the transaction you cannot presume an acquiescence in it. I now come to the legal proposition of the counsel for the plaintiffs, "that no act of a corporation aggregate is valid, unless it be under the authority of the corporate seal." As a general maxim this is correct, but there are some exceptions (d). Where the act to be done is of immediate and urgent necessity, a corporation may proceed without a seal, as to retain a servant (e), to authorize an agent to distrain cattle, damage feasant (f). They may also do an act upon

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(a) 2 M. & S. 265; 1 Camp. 218; 2 Stark. 471.

(b) 1 R. B. 311; 3 Camp. 372.

(c) 1 M. & S. 147; 1 Camp. 410. n.

(d) 1 Vent. 47, 48; Com. Dig. Franchise, F. 13; 1 Salk. 192.

(e) 1 Vent. 47.

(f) 3 Lev. 107.



record without seal, because they are estopped by the record to question its validity, as to appoint an attorney in a court of record (a).<sup>m</sup> When the nature of the institution itself of necessity requires the doing of any particular act, it may be done without the authority of the common seal. Thus the agent of the Bank of England, without any authority by deed, may issue bills of exchange and promissory notes in the name of the bank (b). So if a corporation employ an agent to transact business for them, and they publicly recognize his general acts within the scope and limits of his employment, they will be bound by such acts whether he were authorised under the corporate seal or not. If this were not the case, much fraud might occur; the acts of the agents would be adopted or repudiated as best suited the views and interests of the establishment. So trover will lie against a corporation, if their servant illegally detain the goods of a third person while acting within the limits of his ordinary employment, whether the detention were or were not authorized under the corporate seal (c). A corporation aggregate, like an individual, may in some cases be bound by a mere parol contract, when the contract has been actually executed, for in such case the law implies a promise, and binds the corporation by act of law (d). I think the present case, however, does not come within the principle of any of the exceptions before stated; it is not analogous to any excepted case I have yet seen. The cashier was not acting within the scope of his employment, or performing the established duty of his office, when he gave the bond to the defendant to cancel; the evidence clearly establishes he had the bond in his possession to copy, and not to cancel. The safe keeping of such obligations appertained to the president. If the cashier had no authority to deliver the bond to the defendant to cancel, the act of taking it to cancel must have been tortious.

I have already said there is no evidence of a promise to the defendant to give up the old bond; it was made to Francis

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(a) 3 Salk. 105; Camp. 41, 42.

(b) 3 P. Wins. 419.

(c) 16 East. 6; 2 Camp. 96; 3 Stark. Rep. 50.

(d) 4 Bing. 283; 3 Car. & Pay. 111.

Ridout, but I think it was not binding on the bank even as it relates to him. It certainly could not have been the intention of the parties, that the subsisting security should have been cancelled, unless Francis Ridout accepted the new office and entered upon the discharge of its duties ; without this the execution of the bond was quite a nullity. Now there is no evidence to shew the acceptance of Francis Ridout ; it does not appear that he even acted as teller ; what possible advantage then could accrue to the bank from the execution of the new bond, or what possible detriment could accrue to the defendant from executing an obligation, the condition of which could never be broken. With respect to the supposed tacit acquiescence of the board of directors to the cancelling the bond at their next meeting, after the defendant took it from the cashier, I have already said I think there was not sufficient evidence to establish the fact. It appears to me, however, if the fact had been fully established, it could not be a justification of the defendant's act. The defendant cut his name and seal from the bond some time before the last meeting, and that act I have already said I think was tortious. A right of action, therefore, vested in the corporation the moment the bond was cancelled, and such right, in my opinion, could not be divested out of the corporation without an instrument under the common seal. This principle is recognized in the case of the *King v. The Inhabitants of Chipping Norton*, 5 East., 239. We may go still further back, and shall find that a right of action on the bond itself accrued to the corporation before the cashier gave it to the defendant ; he stated in evidence, that a loss to a greater amount than the penalty of the bond had been sustained by the bank, from the misconduct of Francis Ridout therefore a right to two actions had already vested in the bank before the last meeting of the board of directors. Under such circumstances, a parol consent to the cancellation of the bond was insufficient. Nothing short of a release under the seal of the corporation, in my opinion, could have the effect in law without consideration. Such a release would undoubtedly have extinguished all right of action against the defendant ; but I am unprepared at this time to

say the board of directors would not be individually liable to the corporation, for resigning a valuable right without any kind of consideration.

I am, therefore, of opinion, the plaintiffs can sustain this action on the count in their declaration for trover and conversion.

I now come to the question of damages. If nominal damages only could be given, it would certainly be inexpedient to send this cause down a second time for trial, but if the province of the jury is not circumscribed to those limits, but it is open to them to give such damages as the facts and circumstances of the case call for, then I think there should be a new trial. In trover for a bill of exchange, promissory note, bond or other written agreement, the value of the instrument converted is usually given in damages, that is to say, the amount for which it would be available if in possession of the owner (a).

The subject of the present action is a bond of indemnity to secure the corporation against misconduct in one of their clerks. It appears by the testimony of the cashier, that the clerk in question did misconduct himself in the transaction of their business, and did subject the institution to a loss greater in amount than the penalty of the bond; this fact the cashier establishes. I am of opinion, therefore, the jury may give damages to the amount of the penalty of the bond, if they find the evidence sufficiently strong to warrant such a measure. If the amount of the penalty of the bond were recovered in this action, I think it might be pleaded in bar of an action on the bond, or might be given in evidence to prevent the recovery of damages, upon the assignment or suggestion of breaches, under the statute of 8 & 9 Will. III. chap. 11, in such an action if it could be brought (b). A plaintiff has often an election to bring an action either in form *ex contractu* or *ex delicto* for the very same cause, but he would not be allowed to bring both and recover double satisfaction. In *Cooper v. Chitty*, 1 Burr. 31, Lord Mansfield defined the action of trover to be "in form a fiction, in substance a "remedy to recover the value of personal chattels wrongfully

(a) Cro. Car. 262; 4 Taun. 865; 3 Camp. 477; 1 Car. & Pay. 625.

(b) 1 Saund. 67; 1 & 2 Strang. 733; 3 Will. 309.

“converted by another, the forms suppose the defendant might herein come lawfully by them; and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are given for the act of taking, all must be for the act of converting.” In the present case, the plaintiffs should recover the value of the bond converted by the defendant, and that value is the amount for which it might be made available, if it had not been converted by the defendant. Suppose then the bond were not cancelled, and an action were brought upon it, the specific acts of misconduct assigned or suggested, and those acts fully proved, ought not the plaintiffs in justice to recover damages commensurate to their actual loss, and not exceeding the penalty? I think the same amount of damages may be recovered on the count for trover, if sufficient evidence should be adduced at the trial.

Upon as full a consideration as I have been able to give this case, I am of opinion there should be a new trial without costs, on both the grounds which I at first stated.

MACAULAY, J—(After recapitulating the evidence as above stated). Assuming as a settled principle, that whether there is any evidence, is a question for the court; and whether the evidence is sufficient, for the jury; and that the assent of a party, or his approval or adoption of an act, may be inferred from his silence, or demeanour and conduct, especially under circumstances in which duty or interest would prompt dissent or disavowal; and admitting that the assent of the members of the board of directors, as a board, or their approval or adoption as a board, of the spoilation of the defendants bond as proved in this case, might be inferred from the silence and demeanour of the members present, and be regarded as a *quasi* act and assent, approval or adoption of the board, and sufficient to excuse the defendant from all legal liability as for a tort at the suit of the corporation; still I do not think the evidence offered in proof thereof satisfactory, and if the case depended merely upon a consideration of the sufficiency and weight of such proof, I should be disposed to concur in a new trial, on account of its weakness and unsatisfactory nature, if the motion for a new trial included such a ground. But the opinion I enter-



tain does not reduce the case to that point. In disposing of the motion, I shall abstain from any positive expression of opinion as to what I might or might not hold under an altered or different state of facts and things, and limit myself to the case before us exclusively upon its own peculiar circumstances, leaving the result of this or any other case under a different state of facts for future consideration. I am not prepared to say there was not any evidence of an implied assent of the individual directors present, to what the president said on the first occasion, and of their acquiescence on the second occasion in what the defendant had done between the two periods; and conceding as a general proposition, that where there is any evidence of a circumstantial or presumptive nature merely (as in this case), it is for the jury to weigh and decide upon its sufficiency to satisfy them of the fact it is offered to establish. I apprehend, nevertheless, it may often become the duty of the court to determine not only whether there is any evidence tending to prove the facts alleged and put in issue, but whether there is sufficient legal evidence to warrant the jury in drawing the desired conclusion. There may be evidence tending to prove a portion of a compound proposition, without covering or embracing the whole; or it may, though vague, extend to the whole subject matter. In the former case, the court should require additional proof to entitle the effect to go to the jury; in the latter, the jury must in general judge of it, but if weak and unsatisfactory, the court might relieve against an inference drawn by them in opposition to the preponderating weight of the testimony under all concurrent circumstances, and in peculiar instances though there be some evidence extending to the whole subject matter, it may yet from its feeble character or unsubstantial form, be insufficient in law to sustain the defence, though sufficient perhaps for a jury to draw from it the facts and conclusions which it is desired to confirm.

In the present case, the proof required was evidence of the assent or adoption of the directors, as an act of the board; my reasons for deeming it unsatisfactory are these:

In the first place, however, the evidence is calculated to

shew an implied assent of the members individually, it falls short of proof thereof as a joint act and united assent of the board, a point for the court to determine. In the second place, it is unsatisfactory as proof of individual assent, which however (if there was any evidence to that effect) would be for the jury to weigh, subject to review upon motion for a new trial.

It is unsatisfactory, because the alleged observation or assurance of the president on the first occasion is not clearly proved at all ; the only witness is Mr. Samuel Ridout, who does not speak positively, but he thought the president said that if the former sureties remained, the old bond would be given up on the execution of the new. The cashier, who afterwards actually gave it up, does not corroborate this evidence, but appears to have acted on his own impression of the propriety of giving it up several days after the new bond had actually been executed. Mr. Samuel Ridout not being positive, and the cashier not having heard any such remarks, doubt is necessarily created as to the true purport of what Mr. Ridout heard, and whether any of the other members heard it, and if they heard it, whether they understood it in a like sense. Assuming that they did hear it, it is obvious no unequivocal assent was given by them ; silence prevailed, they were not asked to assent, no opinion was solicited, it was a gratuitous observation of the president, and there was no apparent motive for it. The board had no obvious reason to desire the same sureties again ; there was no suggestion of their having refused or being likely to refuse in fact, or of their claiming as a condition the cancellation of the old sureties. They in truth could not possibly have been consulted upon the subject ; nothing definitive was done upon that point, and all the members might reasonably have expected a future reference to them if the suggestion was seriously intended to be adopted. The argument in favour of their ready assent, is the confidence they then manifested in the clerk by agreeing to promote him, and the probability that so convincing a proof of their satisfaction with his past conduct as surrendering the old securities, might facilitate his procuring renewed sureties, in which point of view any others as well as the former might have been contemplated.

In balancing arguments, I think the silence of the members under the circumstances, does not afford proof at all satisfactory, of their knowledge of what was said, of its import, or of their assent and approbation.

When the president afterwards placed the bond in the cashier's hands, it was for another purpose, and with no instruction or authority to give it up. At this time, considering the object for which it was given, he may be presumed to have known that the former obligors were about to renew; he must have known it when the new bond was delivered to him two or three days before the surrender of the old ones, yet he gave no direction tending to evince the impression made upon Mr. S. Ridout's mind by what he said at the board. This only act from which any inference could be drawn, was his leaving in the cashier's hands the old instrument when he received the new one; yet it seems both were laid on the table near him at the next meeting of the board, up to which time the new security does not seem to have been inspected or approved; a necessary preliminary.

Before the next board the spoliation took place, no unequivocal assent or adoption having been previously received. Before referring to the proof of subsequent adoption, it may be observed in anticipation of it, that the directors were themselves but trustees and agents representing the corporation, but possessing no personal interest in the bond; and the question arises, did they up to this period assent so as to bind their principal? I am constrained to say I think they did not; if not, did not a right of action accrue to the corporation against the defendant the moment he tore off his seal? if so, how has it been destroyed by any thing *ex post facto*? Subsequent adoption by the party for whose *benefit* an act of trespass is committed, may render him a trespasser also; and a similar rule may apply to the adoption of acts of conversion as respects a liability in trover. But the spoliation in this case, was not done for the *benefit* of the bank, and the mere adoption of the act by the directors (no interest being promoted) would not seem adequate to compromise the rights of their principals. Being mere agents and trustees, these directors could only espouse the act on behalf of the

corporation, and when a vested right of action is to be defeated, a sealed release, and not a tacit approbation of the tortious act, would seem the proper and indispensable course.

The occurrence at the late board is principally important, therefore, as evidence from which a former assent might be inferred, or in corroboration of the testimony, and of the inference desired to be drawn from it, of Mr. S. Ridout; the mere tacit adoption or approval of an act prejudicial to the corporation could hardly be held to bind them.

The evidence subsequently is, that defendant being a director at the board, asked the cashier for the old bond to take off another name; that being pointed out to him he took it up and cut off the name intended, and then replaced it. It is certain he did not solicit the previous leave of the president or the board; whether the members present then knew that defendant's own name had been previously removed, or that he then extracted another, is mere matter of conjecture; not being made a point of business, it is quite as likely they were otherwise engaged, and defendant being a director and entitled to interfere with the papers on the table, his act would not naturally awaken attention; no one but a director could have had access to the bond with equal facility. But if the other members were cognizant of what had happened and did then occur, their assent or approval not being asked, they might not have deemed it presumed, or conceived it imperative upon them (however duty might have required it of them) to remonstrate against such proceedings. That the members might well have supposed they were not implicating the bank as assenting or approving, by barely preserving silence when nothing had been submitted to them, is strongly supported by the testimony of the cashier, who being most familiar with the nature and mode of transacting business of all kinds at the board, did not consider them pledged in approving as a board on either occasion; to which is to be added the impropriety of the measure, and the presumption that the directors conform to, and do not violate their duty, clearly appears (*a*). The only remaining proof is, that afterwards the cashier heard it lamen-



ted, he thinks at the board, that the bond had been cancelled; he is not sure it was at the board, he does not name by whom, or assert whether any or which of the members heard, much less which lamented the circumstance, or whether any of them united in the regret expressed, especially as having been sanctioned by themselves. The defendant appears to have relied upon the assurance of the clerk, and the ready acquiescence of the cashier, without ascertaining from any entry in the books, or from any member of the board, whether such a pledge had been made, or such a step sanctioned. Upon the whole, I think it by no means satisfactorily established that the members had actual knowledge of what was said and done on the two occasions spoken of, and if they had, it appears to me, they may as well be regarded as passive hearers and observers merely (as they well might, considering the mode of transacting all business of importance on the part of the board), as considered tacitly assenting to and approving of whatever took place.

In the second place : I am of opinion, that in the case of such a corporation, considering its constitution, and method and forms of transacting business through directors, an assent of the members present at the board to the cancelling of the bond in question, whether preceding or succeeding the act, merely implied from the silence of the individual members, with *opportunities* of hearing and seeing what took place, and *even though* hearing and seeing the same, no question being proposed or submitted for their approval or rejection, is not in law sufficient to compromise the rights and interests of the corporation in the instrument, and to exonerate the defendant from the legal consequences of his act, however a vigilant discharge of their duty might have required a prompt expression of dissent or remonstrance against any contemplated or executed spoliation. I am of opinion, that the mere passive acquiescence of the members under the circumstances in evidence, as found by the jury, is insufficient in law to bar or estop the plaintiffs in this action.

I am not prepared to advance that under no circumstances, as upon reasonable consideration or justifiable arrangement, could the board of directors deliver up the bond or concur in

its cancellation, so as to bind the corporation as between them and the obligor, without signifying their assent under the seal of the corporation. The rules that formerly prevailed as to the necessity of the corporation seal, have experienced gradual relaxation, as an inspection of the cases shews. 1 Salk., 191.—A corporation may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler, for it neither vests nor divests any sort of interest in or out of the corporation.—3 Lev. 107; 6 Vin. Ab. 287; *St. P. Cary v. Matthews* in Mod. 18.—Trespass for taking a ship. Justification in seising for a forfeiture to a corporation, the Canary Company. Demurrer because defendant did not shew the deed whereby he was appointed and authorised by the corporation to seize the goods; for this reason, Twisden, J. thought they could not seize without deed, no more than enter for a condition broken without deed. Sid. 441; S. C. 1 Vent. 47; 1 Keb. 567, 604, S. C.; in all which, though it is admitted that although a corporation may authorise a distress without deed, appoint a cook or butler, imparting no interest, yet they could not appoint a bailiff to appear, license one to take trees, deliver a deed, commit a disseisin or trespass, without deed. Plow. 91.—One may not appear in an assize as bailiff of a corporation without warrant in writing 2 Saun., 305.—In point to all the above. Bac. A. B. Corp. E. 3; 3 P. Wm. 423; 1 Str. 18, S. C.; *Rex v. Biggs*.—Forgery may be committed by endorsing a bank note of the Bank of England, drawn by an officer appointed to sign bank notes, neither the appointment nor the notes being under seal. Com. Dig. Franchise, F. 12, 13; 2 Burr., 1516.—A bill accepted by the East India Company. 1 Bl. 295; 1 Fide Blanque, 306-7; 5 E. 239.—A pauper gains no settlement by holding under or verbal agreement with a corporation, as no interest could pass from a corporation but under seal. Sec. 3, M. & S. 247; 8 E. 228; 2 N. R. 247; 9 E. 360.—Though the affixing a common seal to a deed of conveyance of a corporation, be sufficient to pass an estate without a formal delivery, if done with that intent, yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyances in his

hands until accounts were adjusted with the purchaser.—Derby Canal Co. v. Wilmot, 16 E. 6.—Trover will lie against a corporation (the Bank of England) for a note, and if the detention should be authorised under seal it will be presumed after verdict, but it does not seem necessary that the act of detention, done by their servants within the scope of their employment, should be authorised under seal. Lord Ellenborough says, as a corporation they can do no act, not even affix their corporate seal to a deed, but through the instrumentality or agency of others; he says he finds it said in the books, that a corporation cannot be aiding to a trespass nor give a warrant to do a trespass without writing.—4 H. 79. Again, that a corporation cannot do a tort, except by writing under their common seal.—Bro. Corp. P. L. 34. He recites all the cases, but himself inclines decidedly against the necessity of a writing under seal.—3 Stark. N. P. C. 50, 1821. Abbott, C. J., supports the same view, and it would seem from this cause that a corporation may be guilty of a conversion by the act of their agent, such agent being authorised by their committee acting as directors without seal. The fact then was, the defendant acted under the advice of the company's solicitor, by whose instructions the committee had desired him to be governed. The case went off upon a reference, and the point though reserved was not afterwards mooted. 3 B. & C. 1.—A corporation not established for trading purposes, cannot accept bills payable at a less period than six months, infringing upon the rights of the Bank of England. It is left questionable whether any except a trading corporation, can bind themselves as parties to a bill. See Best, J.; N. P. 12.—That a trading corporation may. 5 Taunt, 794.—That *assumpsit* lies not against a corporation unless the act which authorised the making of promissory notes *eo nomine* by a corporation, *ex vi termini*, impliedly empowered the corporation to make a promise.—5 B. & A. 204.

(To be continued.)

# THE UPPER CANADA JURIST.

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## UPPER CANADA KING'S BENCH REPORTS.

OLD SERIES.

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### BANK OF UPPER CANADA V. WIDMER.

[Continued from our last.]

*Assumpsit* lies against a trading corporation on a bill of exchange, their power of drawing and accepting bills having been recognised by statute.—Murray v. East India company; Russell & Ryan's Crown Cases Reserved, 65 & 71; 4 B. & C. 590. Bayley, J.—Though a corporation can only grant by deed; yet there are many things which a corporation has power to do otherwise than by deed; it may appoint a bailiff and do many other acts of a like nature. 2 (quære) Moore, 532—A corporation cannot maintain *assumpsit* for an executory contract not under seal, although the act creating it empowers the directors to make contracts, agreements, bargains with workmen, agents, undertakers, and other persons employed or concerned in making, completing, or continuing the works. East India Water Works Com. v. Bailey, 4 Bing. 283. T. C.—This case refers to 4 Bing. 75, in which it was decided that a corporation aggregate may sue in *assumpsit* for use and occupation, where the tenant has held premises under them and paid rent, on the principle that the contract was executed and not executory; that being executed, a promise to pay is implied, although if executory an express promise would be necessary. Best, C. J., says the remedy must be reciprocal, and forbears deciding whether a corporation can sue in *assumpsit* on that account on an executory parol contract; 1 Cam. 466, is a similar case in debt; also, 2 Car. & Payne, 371, a like action. 4 Bing. 283, is express that a corporation cannot sue in *assumpsit* upon an executory contract for want of mutuality of remedy, the cor-



poration not being reciprocally liable for want of a contract under the corporation seal. 2 Car. & Payne, 365.—*Assumpsit* sustained by a gas-light company for gas. 4 Car. & Payne 111.—If the Mayor of a town order weights and measures, and when supplied they be examined at a full meeting of the corporation, this is such a recognition of the contract as will make the corporation liable to pay for them, although not ordered under the common seal. Per Lord Tenterden.—“Here the contract was executed on the plaintiff's part; there was also evidence that some weights “had afterwards been adjusted by them.” It seems many minor acts, such as require promptitude, as divest no interest, that require very frequent repetition, or that fall within the very objects of the institution, do not require the seal; and that torts may be committed by the agents of the corporation, acting in the prosecution of and within the scope of their authority.

That upon executed simple contracts, as for use and occupation, or for goods sold, &c., when the benefit is accepted and enjoyed, the law implies a promise to pay without proof thereof, and consequently renders a seal unnecessary, but that executory contracts, when an express promise must be proved, cannot be enforced unless entered into under the corporation seal. In general and especially on important and unusual occasions, more particularly when not beneficial, the seal will be found indispensable.

I do not think this case depends simply upon the two abstract propositions, whether the corporation seal was absolutely requisite; or secondly, whether the directors could under any imaginary circumstances, assent to the cancellation of a surety bond, without resorting to the seal; and if so, then merely examining whether there was any evidence from which the assent of the members *quasi* a board can be implied or inferred, it is my opinion, that admitting as an abstract question the competency of the directors under possible circumstances, to concur in a cancellation so as to bind the corporation without seal, still there is an infinite variety of shades in evidence and in circumstances to be considered in applying the rule, and that it must always form a subject

of judicial discrimination in the particular instance, whether the facts and circumstances of any individual case establish such an assent, and in themselves amount in law to a discharge of the obligor as between him and the corporation; and I am of opinion that the facts established in this case do not in law constitute a sufficient legal defence, without anticipating any other case, or the result that might attend any other state of the facts that may be established in the present action. Though the seal may be dispensed with, (of which I am not satisfied), I apprehend nothing but the unequivocal assent and adoption of the directors, as unequivocal acts of the board, could in law bind the corporation, and the latest case I have seen relating to the point confirms this impression (*a*). If the corporation could be bound without seal, it could only be effected by an unequivocal corporate act previously assenting to, or subsequently approving the spoliation; under what circumstances such an act might operate upon the corporate rights, I need not anticipate. The testimony offered on the present occasion does not, I think, amount to sufficient evidence of assent or recognition as corporate acts, to bind the institution, or justify the defendant; there must be at least, I think, a united assent or recognition evidenced by some unequivocal corporate act of the board: such assent or adoption might perhaps be implied from other corporate acts of the board, involving their admissions; but one implication cannot be founded on another to bind the corporation in the manner contended for on this occasion; the corporation can only be affected by the acts of the directors as a board of directors, and the question is, did the silence of the members on the first occasion amount to a united assent as an act of the board, and did the silence of the members on the second occasion and upon the casual expression of regret at the cancellation, made a fortnight after (assuming that all heard and had knowledge of the facts as they subsisted each time) amount to an approval of the mutilation or spoliation of the obligation as corporate acts of the board. It cannot but be felt that there was nothing more than a forbearance and

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(*a*) 4 Carr. & Payne, III, ante.

passive silence, from whatever cause or motive. Now from the evidence, the jury are first asked to imply that the directors, or a majority of them, heard and knew all that occurred as asserted ; secondly, to imply from their silence, that they individually assented to and approved all that of which they had knowledge ; thirdly, from such implied individual assent to imply a united assent, and that such several and joint assent was given as directors assenting and acting as such, and constituting in law an assent of the board as a corporate act of the same. I cannot believe that a corporation can be affected by such equivocal proof and remote presumptions. However inferences may be drawn, or implications arise in matters equivocal from unequivocal corporate acts, I do not think one presumption can be founded on another, as in this case, to the prejudice of the institution. The provisions of the act of incorporation, the constitution and mode of transacting business, the duties and powers of the directors as therein pointed out and contemplated, the general law of corporations, the peculiar nature of the bank as one, and the nature of the obligation itself, in my humble judgment, combine to invalidate the sufficiency of the present defence. I am by no means satisfied a case could not arise without seal ; the assent of the board may be satisfactorily and clearly expressed in various ways ; by seal (which insures accuracy), and written declarations ; if the seal is departed from, written entries may be substituted, or although no entries be made, acts void of all ambiguity might be proved ; the assent might be called for and individually given, and the instrument might by the president be surrendered to the obligor, upon such assent, in the face, and with the concurrence of the board. Such steps would be acts of the board, and might be proved free from doubt or implication ; such proof is wanting here. Thus far disposes of the case.

In the third place, however, had the assent of the board been unequivocally given under the circumstances proved, I strongly incline to think that the defendant's liability would not be lessened. I incline to believe that a heedless off-hand surrender of such a bond, without equivalent con-

sideration or justifiable reason, without substitute, and without discreet and circumspect caution, would in itself form an instance of *crassa negligentia* in the board amounting to a breach of trust, and entailing equal responsibility to the corporation on all assenting, however upon other and justifiable occasions such surrender might be safely made without incurring any private risk; and I am strongly persuaded that in this case, the bank cannot lose the bond. That if the obligor is discharged by the negligence or ill-founded confidence and imprudent assent of the board, the members consenting must in their turn be liable for a breach of trust. Although the directors are authorised to manage the affairs and effects of the bank, yet they do not possess an arbitrary discretion, they are in the nature of trustees and agents, and they are liable to the same responsibility for misconduct that attaches upon other trustees and agents, and possessing at the same time a circumscribed authority to be determined by the rules of law and equity, they cannot bind the principal beyond the scope of such authority, I would refer to the case of the Charitable Corporation v. Sutton et al., 2 Atk. 400, as apposite; also Coggs v. Barnard, 1 Sal. 26; Willis on Trustees, passim, 125, 169; 2 Troub. El. 168-9; 10 Ves. Jr. 292; 2 Ves. Jr. 42; 5 Ves. Jr. 181; 3 Ves. J. 714; 7 B. R. P. C. 255, 375; 6 Ves. Jr. 174, 488; 4 M. & S. 27; 17 Ves. Jr. 485; 5 Ves. 141; 11 Ves. 319; 16 Ves. 477; 8 Price, 127; 1 Ves. Jr. 297; 1 Hovenden on Frauds, 486, and references; and many other cases, to shew the duties of trustees, and what acts of commission or omission will amount to breaches of trust, and impose personal responsibility.—7 Bing. 95; 1 Hen. 342.

In ordinary individual cases, trover lies by a principal against an agent for goods wrongfully and unwarrantably disposed of by him.—12 Mod. 514, 602; Paly P. & A. 73.

Also trover lies against one to whom goods have been wrongfully transferred by an agent.—3 Atk. 44; 6 E. 358; 6 East. 17, 538; 4 Burr. 2046; 5 T. R. 604; Paley P. & A. 263.

I see not why, in the main, similar rules should not apply to the directors or trustees of corporations; the bond being



given in compliance with the statute, became the property of the bank, and the directors could not compatibly with their duty assent to its cancellation: conceding that, when the business of an institution is to be carried on by directors, their acts ought to be recognized and enforced, though no corporation seal be used; still in such point of view it must be shewn that they were acting within the scope of their authority, and in the due prosecution of the business committed to them; they are not principals, but agents and trustees executing a delegated power. In acting, therefore, the principal is doubtless bound when they act, however imprudently, within the scope of their authority; but as agents they possess no arbitrary discretion to bind the principal in deviation from their legitimate power, to the prejudice of the body they represent. If the directors did not assent, the tearing off the name and seal was a tort, a conversion, and trover lies. If the directors did consent, I do not see that it alters the case; they had no power to consent to a spoliation of the bond of their principal without equivalent or contemporaneous and co-equal countersecurity; the only consequence would be, that trover would lie against all, certainly against the defendant who was the spoliator, also a director, and so had notice. If the corporation could be bound at all by an unwarrantable assent of the directors, I should question whether the seal should not have been adopted; but if the directors had by a sealed consent, sanctioned the cancellation, I am still disposed to think the corporation, if bound, might for such an abuse of the seal resort to an action on the case against all the directors acting in the matter. The only difficulty I have felt with respect to the continued liability of the obligor is the consideration that, in the absence of fraud (and none is imputable to any one here), a release under seal of the corporation would have estopped the bank, though without consideration, &c., their remedy subsisting only against the directors for a breach of trust. Or that an agreement whereby this bond was on certain conditions to be given up to be cancelled under seal might bind them; and here if any assent, or promise of any assent can be presumed, the matter is no longer executory but executed. The bond

is spoiled, which attracts attention to the difference between things executory and executed, and to the operation which the assent of the directors when carried into effect is to have upon the legal rights of the bank, and of the obligor. I have not abstained from reflecting on these possible contingences, but leaving such events to be discussed when they arise, I feel bound to say under the present evidence, that in this case *trover* lies whether the directors impliedly assented or not, but if it came to the consideration of the proof of the assent (as it seems to me, that either the defendant or the directors must be liable to the bank, since the bond has been improperly injured, and as the presumption is enjoined in law in favor of the board acting properly till the contrary is shewn) I should feel bound to hold that there is no sufficient evidence of assent.

Taking all the evidence together, the defence rests principally upon the presumption or inference of the tacit assent of the board, and the question is reduced to this consideration, whether in an action against the members for granting such assent in violation of their duty or trust, such evidence would be sufficient in law to charge them with the value of the bond; if not, in my opinion it is insufficient to discharge the defendant by charging them, for I am much disposed to believe that in such a case of *crassa negligentia* as this would be, the bank cannot be the loser. I say in a case of gross negligence, for from the authorities I think it might be inferred, that when a board of directors squander heedlessly the property or effects of an institution by a proceeding beyond the scope of their authority, they incur a personal responsibility to the corporation. It will not excuse their liability that they acted without reflection, in the confident belief that all was right, and with no design or expectation of entailing loss to the institution; it would be their duty to exercise circumspection and to be assured of the integrity of the officer in the first instance in a case like the present, by a full examination of his accounts, and not to rely upon his general reputation. If after a *full investigation* (which is not insinuated here,) a bond was given up, and subsequently misapplication of monies was discovered which ordinary diligence could not and did not detect; the

*bona fide* conduct of the board might then be urged possibly, but even then the question would remain how far they had at all a right to surrender the bond without consideration or substitute. As a director, the defendant must be supposed to know it was a breach of duty in the members of the board gratuitously to render back his bond, without adequate inducement, and in apparent ignorance of the state of the individual's accounts, whose integrity it was intended to guarantee. The bank cannot be bound in an action against the defendant because the directors assented, and then be precluded from recovering against the directors because they did not assent. If the defendant be discharged, the bank could only fail against the directors, on the ground that they acted within the scope of their authority, *bona fide*, and with due vigilance and circumspection; at least such are my impressions. I am not persuaded that they had any authority to assent to the cancellation of this bond at all, without consideration or substitute; and if they had, I should still think under the present evidence due caution or care wanting, so that either way, whether possessing authority or not, or whether the corporation seal be essential or not, I should think the directors liable to the bank if the defendant is not, which leads again to the question, is there any evidence to charge the directors in an action for negligence, or other breach of trust at the suit of the bank, as having assented to the cancellation of the defendant's bond under the circumstances imputed? I think not; if not, it follows that defendant must be liable, failing to throw the onus on the directors by sufficient legal proof. If the evidence would be insufficient to charge the directors at the suit of the corporation for negligence amounting to a breach of trust, it would not be sufficient to discharge defendant in an action against him. The evidence adduced appears to me rather calculated to shew, that the defendant having imbibed the impression that he was at liberty to cancel his bond, did so under such erroneous impression, that he conceived that mature which was unmatured; and the testimony, (however ample to shew that he acted in good faith, though inadvertently, that he thought he was acting legally, and under due authority; and to rebut any presumption of

wilful malpractice) is in my estimation insufficient to exonerate him from legal responsibility, or to implicate the directors as amenable for the consequences of his spoliation.

As to the damages, no breach of the condition of the bond is proved ; but the action is not for the breach, it is for the bond, and although the wrongful act of the defendant may not have so effectually destroyed the instrument as to prevent a right of action thereon under proper averments, which is my impression, still since the act complained of is clearly a conversion, it is in the election of the plaintiffs to bring trover. If the bond was cancelled by an assent binding on the corporation, of course no suit could be sustained either on the bond or for its deterioration ; but as I think the case lies, the value of the bond seems to be the only proper measure of damages. The condition was for the protection of the defendant ; the action is not for converting the condition, and if in converting the one he has extinguished the other, the plaintiffs should not suffer, since the condition does not shew an actual interest (as a smaller sum of money, &c.) less than the penalty to be involved. The evidence would shew damages to the full extent, and there is nothing to reduce them, the right of the plaintiffs to have resorted to another remedy of itself cannot. They however can only enforce one remedy, and in this of trover there is no negative evidence adduced to shew that the full amount ought not to be recovered. If the other obligor were discharged by the act of the defendant, of course he might incur a much higher responsibility. I think, therefore, the plaintiffs are entitled to recover in this action the amount of the bond converted.

From a review of the evidence, it appears to me, that the defendant has acted under a misapprehension, having made it a point in his own mind, that the bond should be surrendered when the other was given, and having been most probably told that the president said it should be given up, he incautiously, without soliciting the leave of the president or the board, acted upon the impression that the step had been assented to or would be approved, procured the bond from the officer of the bank and cut off the name and seal. His subsequent conduct at the board in tearing off another name,



evinces his impression that there was no impropriety in what he had done ; and though it is stated in general terms that the bank had suffered loss through Mr. Ridout, still from the circumstances of his promotion, and the defendant and others who were directors being his sureties, it is not probable any malversation on his part in the former office of discount clerk was suspected or known at this period ; a firm confidence in his integrity may have rendered all parties less cautious and less vigilant than probably they otherwise might have been. But now that losses are alleged, and at any rate now that the owners of the bond complain of the defendant's act as illegal, it must be judged of according to law under all the evidence. Since it may be inferred that the seal of the defendant was not taken off *mala fide*, not knowingly torn off with a view by that step to cancel the obligation without any authority, but in a mistaken impression that it was legalized by sufficient assent and approval of the board, though not formally expressed or regularly minuted ; it would perhaps be most correct to regard the instrument as impaired by mistake, and that the seal though removed was only so removed in the belief that it was with the concurrence of the directors. The *intent* was doubtless to *cancel*, and *that* constitutes the *conversion* ; yet such intent was predicated upon the presumed assent of the board ; if that assent had not been assumed, the act would have been forborne, but being done with the intent, though in ignorance of the true state of facts, and without the legal authority supposed to warrant it, the legal consequences are incurred ; however, in a case of inadvertency, it may be in the power of the court to stay proceedings on motion, upon the defendant's placing the bank in *statu quo* by substituting another bond of similar import, and of equal validity and effect with the instrument injured. And at all events, admitting that the plaintiffs might sue on the bond notwithstanding the conversion, yet they can have but one satisfaction (a).

To shew that trover lies in this case, the following cases may be referred to ; they differ as to the nature of the remedy pursued against persons tortiously destroying the deeds, but it would seem that trespass or trover may be sustained. Cro.

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(a) 1 D. & R. 20-1 ; 1 Star. Index, 535-6 ; 4 Bing. 462 ; Tidd. 571.

E. L. 723; Pl. 54.—Trespass was held the proper remedy. Cro. Cur. 262; Cro. Jac. 637; 1 Cour. 355; Har. & Res. 111; 4 Mod. 156-7; Sal. 654; 1 Ld. Ray. 275, T. C. That trover lies, see also Com. Dig. Action on the Case A.; Morgan's Vade Mecum, 264; Cro. El. 626; Cro. Jac. 255; 4 Bur. 2345; 3 T. K. 63; 2 M. & S. 415; 4 Taunt. 865; 2 Mod. 272; 1 Com. 58. Or that a special action on the case for a tort will lie, if the subject matter be not susceptible of redress in trespass or trover, or any of the established forms in law. The following references shew, that cutting off the signature and seal, *animus cancellandi*, is a conversion of the instrument, so as to enable the obligor to sustain case, although being done by the party bound, the instrument may still subsist, not actually cancelled as respects the rights of the obligor under it, at his election.—5 Co. 23, 119; 10 Co. 92; 11 Co. 27; Piggot's case, Cro. El. 408, 546, S. C.; Cro. El. 800; 2 Buls. 247, S. C.; 2 Lev. 35, 220; 2 Show. 28, S. C. Lenton v. Henson; 1 Vent. 185, S. C.; Bull. N. P. 267-8. *Semble*, that on *non est factum*, a deed without a seal does not support issue.—Lutch. 226; Palm. 403, 405; 8 Mod. 278; 1 Mod. 11; 3 Buls. 79; Benn. 8; Gould. 83, S. C.; Cro. El. 120, S. C.; 2 M. 676; Cro. Cur. 399.—That an obligor or lessee altering a deed may invalidate it as to himself, but not as to the obligee or lessor, except at their election.—13 Vin. Ab. Fails. T. & U.; Cro. E. C. 626; 9 E. 353-4. For some valuable remarks on the above cases, Touch. 70; and see my notes in the case of Leonard v. Merritt, last year, 1830-1; 3 Bulst. 79; citing Year Book, 43, E. 3—that if one hath a deed and the party from whom he hath it takes the deed from him, and takes off the seal, he may plead this deed without shewing of it, but shall plead that the adversary has done this.—1 Rol. 188; 2 H. B. 264; 1 Vent. 297; Dyer, 261; 19 Co. 99, Leyfield's case; Cro. Car. 399; 3 T. R. 153-6, note; 1 B. & C. 682; 3 D. & R. 112; 4 T. R. 399.—That in these days, if a seal be torn off before action brought, there is no difficulty in framing a declaration which would obviate every doubt upon that point, by stating the truth of the case. 6 E. 11, 309.—That where spoliation will not destroy a subsisting specialty; Com. Dig. Fact, 1 & 2, notes; 2 J. & B. 259; 1 Ch. Rep.

52. If an estate has passed by deed, the cancelling the deed will not divest the estate.—2 Lev. 113; McLel. & Y. 466; 1 C. & P. S. C. As to the destruction of a specialty by cancellation and the effect thereof, see further Touch. 70; 6 E. 309, A. 86; Cro. E. 483; Drynion, Title Deed, 587; 2 Com. 308-9; 6 E. 86—The mere cancelling a lease by mutual consent is not a surrender within the Statute of Frauds.

These cases shew that to constitute a cancellation there should be mutual consent; a destruction by one, without assent of the other, is not a cancellation in law at the present day, but a tortious injury and actionable.—Cro. Jac. 255; Cro. El. 723; 4 Cruise. Dig. 496-7; Platt on Contracts, 594; 1 Coventry & Hughes, Dig. 470-1.

As to the point of damages, the following authorities shew that the destruction or cancellation of the bond now in question as to one or more of the obligors, would not operate as a discharge of the others, being several and not joint.—5 Co. 23; March. 126; Cro. El. 408, 546; Bul. N. P. 268; 1 B. & C. 682; 3 D. & R. 112 (all the cases collected); Dixon on Deeds, 586-8.

The following are calculated to shew that the damages should not be nominal,—8 Co. 826, Vinger's case; Cro. Jac. 255.—Where an objection that it was not averred that plaintiff lost his annuity, though he lost the deed, was overruled; Cro. El. 626; Mon. 547; Pl. 730, S. C.; 9 E. 354; Cro. Jac. 637-8; 4 Taunt. 865; 3 Stark. Ev. 1503.—Where trover is brought for converting a security, the damages usually given are the amount of the sum secured. 1 Chit. R. 501; 3 Car. 477.—Trover for a bill of exchange. Lord Ellenborough says, in trover the rule is, that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion. 2 Stark. N. P. C. 167.—In debt on an indemnity bond, plaintiff recovered the whole penalty, no proof of less damage being offered. 5 E. 266; 5 Taun. 453.—That if the submission under an arbitration bond be revoked, the whole penalty is incurred.—5 B. & A. 507; 1 D. & R. 106; 2 Chit. 316, S. C.; 4 B. & C. 106; 6 D. & R. 213, S. C.; 1 McLel. & Y. 466; 1 C. & P. 651, S. C.; 8 Co. 82.

## DOBIE V. MCFARLANE.

An attorney having received declaration without denying that he was defendant's attorney, and a plea having been requested from him several times, he not denying his character as attorney for defendant : the court set aside interlocutory judgment, signed for want of a plea, without costs, but stated that they would on application against the attorney, order him to pay the costs.

*Draper* shewed cause against a rule obtained by *Campbell* to set aside the interlocutory judgment.

*Campbell* replied.

The case, as stated on affidavit, appears from the judgment of the court, which was given this term.

ROBINSON, C. J.—The defendant in this case applies to set aside the interlocutory judgment and assessment of damages upon it, on the ground that no appearance was entered by defendant, nor appearance by plaintiff for defendant, or common bail filed, before judgment was signed ; and that declaration was never served or plea demanded, otherwise than by serving copy of declaration, and of demand of plea, on Mr. Campbell, an attorney of this court, who had entered no appearance for defendant as his attorney, and who denies on affidavit that he was or is attorney in this cause.

On the other side several affidavits are filed, tending strongly to shew that from the conduct and conversation of Mr. Campbell, and of the defendant himself, every reason existed for supposing that Mr. Campbell was the attorney for defendant in this cause, and fully prepared and instructed to receive declaration for him, and make his defence. Some days before the assizes, the plaintiff was informed, that as the attorney had never actually appeared in the cause, he declined acknowledging the service, and that the defendant intended to object on that ground to the regularity of the judgment. The plaintiff not having time before the assizes to serve his papers anew on the defendant personally, and regarding the conduct of Mr. Campbell as an unfair contrivance to throw the cause over the assizes, determined to rely on the steps he had taken ; and having served notice of assessment on the defendant personally, he proceeded to assess damages at the last assizes for the District of Niagara.



The question now is, whether his proceedings can be sustained ; if they can be, it would undoubtedly be just that they should be ; if they cannot be legally sustained under the circumstances, then the court must set them aside, however reluctantly, and it will remain to be considered on what terms they should be set aside as to costs.

The case of *Williams v. Strahan*, 1 New Rep. 309, is strongly in point to shew that a defendant, by accepting a declaration, and acting as if an appearance had been entered, waives the want of an appearance, so that he cannot afterwards insist upon that irregularity as an objection to the judgment. So also in the case of *Pepper v. Bawden*, reported among the cases of practice in C. P., page 31, the court held that a prisoner in the fleet, charged with contempt in chancery, having received a declaration and suffered judgment to go against him without complaining of any irregularity, could not afterwards object that leave of the court had not been obtained before he was served with declaration.

The court determined, that although the practice expressly required that such leave should be obtained, yet that the defendant by accepting the declaration, and lying by, had waived the irregularity.

In these cases, I conceive it is the party in the cause who is held to have precluded himself from complaining by his own acts or acquiescence. In this case the question is, whether the party can be concluded by the acceptance of a declaration by an attorney who had not appeared for him, and who according to the defendant's affidavit was not authorised to appear for him.

Nothing but clear proof of collusion between the defendant and the attorney, to deceive the plaintiff, by misleading him to the belief that the defendant had appeared, or was authorised to accept declaration and plead, would warrant us in holding this case to be bound by the same principle as those I have cited.

I cannot say the affidavits establish that point beyond contradiction, though they give ground to suspect it, for much stress ought not to be laid upon the answer to an interrogatory put to the defendant in the street on a Sunday, in order

to draw an admission from him. Besides, the plaintiff need not and could not have been misled if he had used ordinary diligence, for a search in the proper office would have shewn him at once that no appearance had been entered by Mr. Campbell as defendant's attorney, and that consequently if he wished to proceed, it was necessary to enter appearance for the defendant, and to serve the declaration upon him personally.

Whatever the court might do, if an intention to mislead were clearly established against the defendant, or even if it were certainly shewn that he was aware of the erroneous service of the declaration and demand of plea on Mr. Campbell, at the time of their being served, I think in this case the rule must be made absolute, but without costs, for certainly the peculiar circumstances of the case fully warrant us in withholding the costs, and unless Mr. Campbell can exonerate himself from the appearance of unfair practice, which the affidavits disclose, I think he should pay the costs which the plaintiff has been put to in resisting this application.

MACAULAY, J.—Trespass for breaking into a blacksmith's shop.

Mr. Campbell moves to set aside the interlocutory judgment on the grounds :

First, that no appearance or common bail has been filed by plaintiff or defendant.

Second, that Mr. Campbell, upon whom copy of declaration was served, was not defendant's attorney on record.

It appears, that before the act of trespass complained of, defendant consulted Mr. Campbell, who accompanied him, and saw the alleged trespass committed. That after suit, defendant told plaintiff's attorney, that Mr. Campbell was his attorney. That plaintiff's attorney did not search for appearance, or enter common bail, but upon a general understanding as to liberal practice, had in several instances not adhered to the strict rules of the court. That conceiving Mr. Campbell was defendant's attorney, having conferred with him as such, and the assumed character not being denied, &c., he served a copy of the declaration and demand of plea upon him in the usual way. That the declaration was not

returned or rejected, and that no plea being filed, Mr. Campbell was more than once asked for the same, on which occasions he did not disclaim the character of defendant's attorney, or refuse the service made, but rather passed over the matter silently. After a lapse of time, and when the assizes approached, he distinctly refused to plead, and denied that he had appeared, or was attorney on record for defendant. Under these circumstances plaintiff's attorney signed interlocutory judgment, gave notice of assessment to defendant himself, and assessed damages in a small sum at the last Niagara assizes. After the interlocutory judgment was signed, notice of defendant's intention to move in term to set aside the proceedings, was served on plaintiff's attorney by Mr. Campbell, who signed such notice as counsel for defendant. It would appear that Mr. Campbell temporised with plaintiff's attorney with a view to throw him over the assizes, and it is to be considered whether under all the circumstances disclosed, the interlocutory judgment should not be sustained, or if set aside Mr. Campbell be called upon to pay the costs. Mr. Campbell does not move on the original irregularity, but subsequent steps, and although not attorney on record, he was nevertheless, I infer, the defendant's attorney in the subject matter. If he was his agent to give notice of exception to the proceedings, which was an act as attorney, and not as counsel, he was in other respects his agent or attorney, except that he had not appeared for defendant in the cause.

The whole matter induces me to think, that Mr. Campbell must be regarded as all along the advisor and attorney or agent of defendant; and the question is, whether a good service of declaration can be made upon an attorney, who, though the party's attorney, has not appeared.

Many cases shew that where an attorney has undertaken to appear, the court will compel him to do so; and although this may argue that an appearance was essential to enable the suit to proceed, yet other cases shew that where a party acts as if he had appeared (and why if his attorney does do) he shall be bound, and not heard to object, as 1 N. R. 309; 2 Chitty R. 165; Com. Dig. Pl. P. 4. If the attorney for defendant accept declaration from plaintiff's attorney, it shall be an appearance for defendant.—Per. R. 39.

If he undertakes to appear it shall be an appearance.—Mod. Ca. 42. Not an appearance if the defendant's attorney afterwards sends back the declaration.—W. R. 41 ; 1 Chitt. R. 129 ; 6 Mod. 42, 86 ; Strang. 693.

It is urged by Mr. Campbell, that he conceived it due to his client to take the course he did, but (Maughan's Law of Attornies, 124) it is said, that besides the duty which an attorney owes to the court and his client, he is bound, as regards the opposite party and his professional brethren, to conduct his business with fairness and propriety.

Under all the circumstances, I incline to think the judgment may be sustained ; but as the client does not appear to have desired or participated in any unfair practice, and as owing to the course pursued by his attorney he was precluded from a defence at the last assizes, and as it is not quite clear that the plaintiff was not irregular in signing judgment after notice of Mr. Campbell's refusal to plead, and knowledge of the want of any appearance, I am disposed to think that the best course is to set aside the assessment and interlocutory judgment without costs, upon condition that the defendant appear and plead issuably forthwith to the declaration already delivered, the service of which is not substantially objected to. It may form subject of future consideration whether Mr. Campbell should be ordered to pay the costs accruing from the time of such service.

The rule was made absolute without costs.

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SOPER V. DRAPER ET AL.

A plaintiff cannot treat a special demurrer as a nullity, and sign judgment for want of a plea, though the demurrer may appear frivolous.

A rule *nisi* was granted to set aside interlocutory judgment and subsequent proceedings, on the grounds stated on affidavits.

The defendant not appearing to the process, the plaintiff entered common bail by the statute and declared, and after some delay on his part, which was stated to have arisen from forbearance on account of an expected compromise, the defendant filed a special demurrer, assigning for cause that the declaration was entitled in the first year of the king's



reign instead of the first and second year. The plaintiff had declared as of Trinity term.

Considering the plea as altogether frivolous, the plaintiff signed judgment and assessed damages. Notice was given (before the assessment) of the present motion.

*Washburn*, against the rule, urged that the demurrer was evidently a sham plea, and moreover it was signed by the attorney as attorney and counsel. The pleading by attorney without an appearance by him is irregular, and a special plea should be signed by counsel.

*Solicitor-General* in reply.—Supposing the plea frivolous, and the demurrer groundless, the plaintiff had no right to judge of it and reject it as a nullity. As to the pleading by attorney without appearance by him, it would have been irregular to have appeared twice; the defendant was fully before the court by the common bail, and I see no objection to his appointing an attorney at any stage of the suit. The signature of attorney and counsel was merely a statement of the truth that the attorney was also counsel in the cause.

ROBINSON, C. J.—With respect to the statement respecting the prospect held out of a compromise, nothing can turn upon that, for unless the defendant is absolutely under terms, he is not to be limited in his right of pleading. His plea indeed may be so evidently a sham plea, or so perfectly nonsensical, that the court will set it aside or will support the plaintiff in treating it as a nullity, and signing judgment.—*Bury v. Bishop*, 1 Saund. 318; *Hopgood v. Wright* and others, 2 New R. 188; and *Bartley v. Godslake*, 2 Barn. & Ald. 199; are cases of this kind: in *Bullythorpe v. Turner*, Willes 481, the court intimated a strong opinion against this course, in general, stating that the plaintiff should not judge for himself, but if the plea be defective, should demur.

Our statute 2 Geo. IV. ch. 1, provides an expeditious mode of getting rid of a dilatory plea, where the defence pleaded is matter of law and not of fact; and though I would not say that the plaintiff, having such a course open to him, cannot with or without the leave of the court, treat any plea as a nullity, however absurd and frivolous, yet except in very extreme cases, I should be the more inclined on that

account to leave him to get his judgment upon the plea, rather than by *nil dicit*. The plaintiff, I think, was bound to join in demurrer, and have it disposed of. The rule *nisi* which has been granted must be made absolute.

SHERWOOD, J., agreed with the Chief Justice.

MACAULAY, J.—A frivolous cause of special demurrer cannot deprive the plea of the force and effect of a general demurrer; any cause of general demurrer might have been urged when it came to be argued, and it was for the court to judge whether the objections made to the declaration were well founded (a).

The plea was regularly signed by counsel, and the introductory mention of the attorney may be rejected as surplusage if objectionable; but from the books of practice, it would not seem irregular for a defendant to plead personally or by attorney, after appearance entered for him by plaintiff (b).

He is in court to answer the plaintiff, and the plaintiff demands a plea. I find nothing to shew that after a personal appearance or appearance by statute, the defendant may not enter his plea by an attorney not of record by having appeared for him (c).

The defendant's attorney before pleading should file a memorandum of warrant to defend, after common bail per statute (d), but the want of this is not objected here (e).

I think the rule should be made absolute.

On the court giving judgment, *Washburn* said he hoped the rule would not be made absolute with costs.

The court, after consideration, made the rule absolute with costs.

(a) 1 Sh. 1234; 2 N. R. 188; 10 E. 337; 1 Arch. 137-8.

(b) 1 Arch. Prac. 138.

(c) 4 Taunt. 545; 1 B. & P. 366; 2 Sal. 545; Tidd. 244; 1 Arch. Prac. 35, 345.

(d) See 25 Geo. III. chap 80, s. 22, 29; 1 Arch. 335.

(e) 1 Sellon, Pr. 19.

## MEIGHAN ET AL. v. PINDER.

*Sullivan* moved for an attachment against the estate and effects of the defendant, and as it was the first moved in court, prayed the court to give a form of the writ, that the practice under the statute might be uniform.

The Court gave the following form to the Clerk of the Crown and Pleas :—

William the Fourth, &c.

To the Sheriff of the————Greeting.

We command you, that without delay you attach, seize, take, and safely keep all the estate, as well real as personal, found within your District, of——, an absconding or concealed debtor, of what kind or nature soever, together with all books of account, vouchers and papers relating thereto, pursuant to the statute in such case made and provided, at the suit of——for the sum of——, and what you shall have done herein, return to us at York, on the——day of——term next, with this writ.

Witness, &c.

## ANONYMOUS.

*Notman* moved for an attachment under the statute 2 Will. IV., chap. 5, which was refused, there being but one person swearing besides the creditor applying. In giving judgment the Chief Justice said, I hope the profession generally will understand, that the safest rule in framing these affidavits will be, to follow as closely as possible those relating to common affidavits of debt.

## DOE EX DEM. RICHARDSON V. DICKSON.

A conveyance to an alien is not void, but to the use of the king, and it is not sufficient for a plaintiff in ejectment to prove that the defendant claims through an alien, and a title in himself, which would have been good, had the defendant's title or claim not existed.

This was a special case settled by *Draper* for the plaintiff, and *Sullivan* for the defendant, at the Niagara assizes, and a verdict was taken for the plaintiff subject to the opinion of the court

December 19, 1826.

By indenture of mortgage of this date, between Edward McBride, then seized in fee, of the first part, and Thomas Acres, an alien, of the other part; the premises in question were granted, sold and conveyed to the said Thomas Acres, to hold to him, his heirs and assigns in fee, subject to a proviso therein contained for the redemption thereof, upon the payment of three hundred and twenty-five pounds, seventeen shillings and two pence, upon the thirtieth day of May in the year of our Lord one thousand eight hundred and twenty-eight, duly executed by grantor, and registered the first day of December in the year of our Lord one thousand eight hundred and twenty-six.

By the indenture between the said Edward McBride of the first part, and Robert Dickson, defendant, of the other part, the same premises were mortgaged to the said defendant in fee. This mortgage, duly registered on the second day of August, in the year of our Lord one thousand eight hundred and twenty-seven, it is admitted was in trust for the benefit of Barney Evason (an alien), subject to a proviso therein contained for the redemption thereof, upon the payment of two hundred and nine pounds, five shillings and six pence, by instalments, the last of which became due on the fifteenth day of August, in the year of our Lord one thousand eight hundred and twenty-nine.

April 27, 1827.

Judgment on this day duly signed, entered and docketed in the court of King's Bench, in favour of Cornelius Egberts and Egbert Egberts, two aliens, resident in the United States, against the said Edward McBride, for two hundred and fifty-three pounds, eleven shillings and eight pence. Upon this judgment, a *fi. fa.* against the goods and chattels of the said Edward McBride issued on the seventeenth day of November, in the year of our Lord one thousand eight hundred and twenty-seven, which was duly returned *nulla bona* by the sheriff of the district of Niagara.

A writ of *fi. fa.* against the lands and tenements of the said Edward McBride thereupon issued, returnable on the first day of Michaelmas Term, 1829, which was delivered to



the sheriff 1st September, 1829, under which writ the premises in question were duly seized and sold, by the sheriff of the said district of Niagara, to the lessor of the plaintiff, Edward McBride, at the time of the sale, the 10th May, 1830, being in possession of the sheriff's deed, dated 18th June, 1830, under which the lessor of the plaintiff claims.

Prior mortgagee, Acres, died on or before the — day of —; neither of the debts secured by the mortgages have been paid. Notices of mortgages were given publicly at the time of sale; the deeds were exhibited, and the defendant forbade the sheriff to sell, in the presence and hearing of the lessor of the plaintiff, who inspected mortgages. The sheriff sold to the lessor of the plaintiff (against defendant's consent), but stated the sale as subject to the mortgages.

The different documents above mentioned or alluded to in the exemplification of judgment, writs and mortgages, to be filed, and the case subject to any points arising out of the inspection of them.

The defendant was put into possession by McBride, on the day of the sale by the sheriff, but after the sale had taken place, both as agent for the legal representative of Acres, and in his own right under the second mortgage, and the tenants allowed to him and agreed to pay him rent, which they since have done.

*Attorney-General* for the plaintiff.—The estate did not pass by the mortgage to Acres, under which the defendant holds; it is made by bargain and sale, and can only operate under the statute of uses. The law will not cast an estate on an alien so as to induce a forfeiture; as in the case of a descent, the alien is passed by, and the estate vests in the next heir who is not an alien, so in this case no use can arise to the alien, nor will the Statute of Uses operate to vest an estate in him (a).

If then this mortgage be void, the judgment attached upon the lands before the second mortgage, and the estate is legally sold under it to the lessor of the plaintiff.

*Sullivan* for defendant.—If the doctrine upheld on the part of the plaintiff were correct, several questions hitherto debated

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(a) Dyer, 283, b.; Allyn, 15.

and yet unsettled, must be decided in favour of the lessor of the plaintiff before he could be considered as entitled to recover.

In the first place the judgment is in favour of an alien, and the statute 5 Geo. II. ch. 7, only gives the right to subjects of the king. The words of the statute are direct and positive, and so it would seem the sale must be considered void. The plaintiff must recover on the strength of his own title, and therefore supposing the defendant to have no title, he must yet have the *postea*.

Secondly, the question would arise as to the time a judgment attaches upon lands so as to bind them for the purposes of a sale under the statute; if the judgment is a lien on lands only from the placing the writ in the sheriff's hands, the defendant has a title under the second mortgage, even supposing the first to be void.

Thirdly, the writ in its terms has no relation back; it directs the sheriff simply to levy of the lands and tenements of McBride, which evidently means his lands and tenements at the time of the teste, and not at the time of the judgment. But the law is so plain in the first point, that there is no necessity to argue these disputed questions.

The fact of the first mortgagee being an alien, can only be taken advantage of by the king, to whose use an alien purchases; and the Statute of Uses plainly shews by its preamble, that a use will arise to an alien and be vested by the statute so as to produce forfeiture or office found; as one of the evils complained of in that preamble, is the evasion of the law by conveyances to the use of aliens, whereby the king loses his right of forfeiture. The case quoted in *Alleyn*, 15, is in point in this respect in favour of the defendant; it is therefore evident, that whatever right the crown may have, the lessor of the plaintiff has not any, and that the *postea* must be given to the defendant.

Judgment was given this term.

ROBINSON, C. J.—There can be no doubt that the defendant is entitled to the *postea*. The defendant, as mortgagee in trust for an alien, had the legal estate, and as it was prior to that which the lessor of the plaintiff advanced under the

judgment and execution, he must of course succeed. It is unnecessary, therefore, to determine whether there is any thing in the objection taken by the defendant to the plaintiff's right to recover, founded on the 5 Geo. 2, ch. 7, and I will only say that at present I do not think, if his case required the aid of that objection, that it would be found sustainable. It would seem necessary upon principle, that such an objection should have been taken in the original action by plea, in bar of execution against the lands, but that point is not to be considered as decided in this case. At all events, the defendant is entitled to a verdict upon his title, and were the law otherwise, I am not inclined to think that the lessor of the plaintiff could succeed in this ejectment, considering the circumstances under which he purchased. The land was sold subject to the two mortgages, their validity being assumed, and the bid was made upon and above them; it would therefore be grossly unjust if the lessee of the plaintiff, buying on such an understanding, openly expressed and assented to, could treat the mortgages as null and eject the mortgagees. If indeed the mortgages were null, the only just and necessary alternative, according to my present opinion, would be, that the sale would be void as made under a misconception, and that the estate must again be sold.

SHERWOOD, J.—There is no necessity to consider any but the one point; it seems to me that the first mortgagee being an alien, does not prevent the land passing from McBride, against whom the judgment was; I therefore agree with the Chief Justice.

MACAULAY, J.—It appears by the case drawn up for the judgment of the court, that before the judgment under which the plaintiff claims, the land in question had been mortgaged in fee to an alien, and forfeited since for want of redemption; that after the judgment and before execution against the lands, they were again mortgaged in fee to the defendant, in trust for the benefit of one Evason, an alien, and a creditor of the owner McBride.

As a party in ejectment can only recover on the strength of his own title, and not on the weakness of the adversary's,

the first question that arises is, whether the lands in question could be sold under an execution founded on a judgment recovered in favour of an alien not a subject of his Majesty. With respect to the strict legal right of an alien judgment creditor to sell lands under 5 Geo. 2, ch. 7, it seems to me unnecessary to decide that point in the present case. The act provides that lands in the plantations, &c., shall be liable to and chargeable with all just debts, &c., owing by any person indebted to his Majesty or any of his subjects (*a*); aliens resident abroad are not comprehended, and there is no other authority under which real estates can be sold at all in satisfaction of debts. The important question here is (assuming the disability urged), where and how is such disability to be objected. In some cases of partial exemption from the ordinary process of execution to the full extent (as a discharge under insolvent laws, and exemption from final process against the person), the privilege may be pleaded in bar of the writ of *ca. sa.*, or it may be taken advantage of by motion, but whenever a creditor is restricted in his remedy as to after acquired goods, &c., under insolvent laws, a special judgment must be obtained upon a *scire facias*, or otherwise, to warrant the special execution, a general judgment not sustaining it; and doubtless in a case of the present kind, a defendant might plead (admitting as he would be constrained to do, the debt demanded) the alienage of the plaintiff, in bar of his execution against the lands; or it is probable that should he not do so, he might, after the writ against lands, and before its execution by sale, move the court to quash it by reason of the ineligibility of the plaintiff to sue it forth; but after a sale it becomes a different consideration, when the rights of a purchaser holding under a sheriff's deed, without or with notice, are involved.

*Prima facie*, every suitor in the king's courts is deemed a subject competent to sue, and entitled to all the ordinary remedies afforded in the courts of justice; if a personal disability, such as alien enemy, or alien simply when a sufficient objection, is intended to be objected, it is required to

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(*a*) See 2 Co. 25.



be urged in the first instance, or the defendant is estopped to press it at any ulterior stage of the proceedings.

By parity of reasoning, the disability as to the extent of the remedy afforded in all ordinary cases should be made *in limine*, but as such a plea would preclude the denial of a demand which it might be fair and just to contest in the first instance, perhaps the disability might be urged after judgment; it clearly might be done before. But in the absence of any such exception, the judgment in this case appears, on the face of it, to be recovered in favour of two individuals entitled to sue and reap the ordinary fruits of a judgment. It is a common judgment in *assumpsit* for goods sold, &c., and nothing on the face of the record indicates that the plaintiffs were aliens; apparently therefore they were entitled to execution against the lands, the sheriff was commanded to sell them, a year elapsed, no objection was offered in impeachment of the writ, a sale ultimately took place, and a deed was duly made by the sheriff to the plaintiff. I do not think it now lies in the mouth of the defendant, or of any one claiming under him by title acquired since the period at which the lands became charged by the proceedings, to impeach the title acquired under the sheriff's deed. The following cases illustrate fully the principle on which I rest; I would, however, refer more especially to Dyer, 363, where a term was sold, and afterwards judgment reversed. The court refused to restore the term because it was legally sold through default of the party himself. Cro. El. 278.—Sheriff sells by authority of law to levy the money, and then if the judgment be reversed, the party shall be restored only to the money and not to the term. Cro. Jac. 246.—The *fi. fa.* gives authority to the sheriff to sell, wherefore when he sells a term and the execution be reversed, yet the term shall not be restored, because duly sold by act of law. 8 Co. 96.—The sheriff had lawful authority to sell, and by the sale the vendee had an absolute property, and though the judgment which was the warrant for the *fi. fa.* be reversed, yet the sale, which was a collateral act, shall not be avoided, otherwise it is said none would buy of sheriffs goods and chattels, for fear of losing

afterwards both goods and money (*a*). I am of opinion, therefore, that the plaintiff is *prima facie* entitled to recover, notwithstanding the alienage of the plaintiff in the former suit, the same not appearing on the record, nor being objected to until now, in this collateral way, upon an ejectment by the sheriff's vendee.

The next enquiry then is, whether the defendant shews an adverse right sufficient to preclude the plaintiff's recovery.

It has been suggested as one point important with respect to the mortgage to defendant in August, 1827, between the judgment and the issue of the execution, whether (admitting the liability of the lands to sale) they were *bound* for such purpose from the *entry* and *docket* of the judgment, or only from the *issue* of the *writ* and delivery thereof to the sheriff.

It is unnecessary to decide that question in the present case, if the mortgage to Acres in 1826, previous to the judgment, was sufficient to divest the estate out of McBride from that time, whether for the benefit of alien Acres or the crown.

I am prepared, however, to express my opinion upon the point, but even admitting the lien of the judgment from its entry and docket, unless the execution has relation to that period, it would remain a question whether it operated upon any estate not held at the time of its teste or issue, so as to enable the sheriff to sell any land alienated between the judgment and the writ.

The writ is tested the last day of Trinity Term, and issued in August, 1828; it recites the return of *nulla bona* against the goods, and commands the sheriff to levy the debt of the lands of the defendant, not of the lands of which he was seised at any antecedent period, but of his lands, which probably might be held to extend only to lands of which he was seised within the period to which the writ itself on the face of it relates.

Being of opinion, however, that the mortgage to Acres in 1826, bars a recovery in the present action, the above points are not necessarily involved in this decision.

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(*a*) 1 Ves. Jun. 195; 9 Ves. Jun. 37; 12 Ves. Jun. 89; Carth. 420; Yelv. 119; 1 Browne, S. C. 50; Moore, 573; 2 Leod. 92; 2 R. 90, 96; 1 Arch. 260; 5 Mod. 375; Godbolt, 27-8, 103.4; Jenk. Contr. 264; 1 Roll. 778 (Error, 111); 3 Just. 162; Mo. 668; Yelv. 28; Cro. El. 908; Mon. 573; 1 M. & S. 425; 6 M. & S. 110; 8 Co. 143.

It is unnecessary, too, to decide whether an equity of redemption may be sold at sheriff's sale upon a *fi. fa.* against lands, because the first mortgage in this case being in fee, and forfeited, the legal estate and right of possession are divested out of the mortgagor, and the question cannot arise in ejectment until the mortgage be redeemed.

With respect to the power of aliens to purchase lands, &c., it seems settled that an alien cannot be a freeholder or inherit.—1 Com. Dig. 67; 3 Cruise, Dig. 340. But he may take by purchase—11 H. 4, 26; 14 H. 420; Co. Lit. 26 & 52. Or by devise.—316 Park. Rep. 144; 3 Kib. 749; Pl. 24; Went. 325; 2 Leo. 191; 2 Mod. 224. Though for the benefit of the crown upon office found.—M. H. 4, 28; 14 H. 4, 20; 18 H. 6, C. 6; Powell on Mortgage, 138. An alien may be a mortgagee, but if a mortgage of land be made to him in fee simple, or for a term of years, he cannot hold it, but the king will be entitled to have it from him. However, until office found and the lands seized into the hands of the king, the alien would seem as against all others entitled to hold the estate. He is a good tenant of the freehold to a *præcipe*, in a common recovery.—4 Leon. 84; Goldsb. 102; 10 Mod. 128.

It is said (a) that an alien cannot maintain a real action for the recovery of lands, but even if so, it does not follow that he may not defend his title against all but the crown, and the title of the alien in favour of the sovereign is not divested till office found; see 1 Bac. A. 6: Alien, C. 163; 5 Co. 22—that an office of entitling is necessary; also, Par, Rep. 267, 144; Hob. 231; Bro. Dendzeu, Pl. 18; Co. Lit. 26; unless where an alien dies, when to prevent an abeyance of the estate the king becomes seised without office. As the facts of the present case are submitted, it is not apparent nor is it necessary to decide, whether the king by reason of the death of Acres is absolutely seised of the lands in question or not, or whether a judgment of office or at least a seizure into the king's possession may be previously requisite; see 14 H. 7, 21; 15 H. 7, 6, 20; Stamdf. Pr. Reg.; Ck. 18 P. 54; 4 Co. 58, Ab.; see also cases referred to in the case in this court last year, *Do ex dem. Howard v. Macdonald*; Chitty's Prerog. 247 to 251; Gilb. His. Exchr. 10, 109, & 132; 3 Hob. 347; 3 Bl. Com. 259-60; Finch. 325-6; Hob. 230; 12 East. 109-10; Com. Dig. Prerog. D. 6, 7, 8, 9, & Forfeiture, 16 Vin. Ab. Office, and many cases.

The foregoing cases relate more particularly to the first mortgage. As respects the second, that to defendant in 1827, even were it wholly in trust for the benefit of aliens, which

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(a) Co. Lit. 1296; Dyer, 26; & Thel. Dig., C. 6.



does not appear, still in cases of trust, the trustee being a subject holds the estate at law, and the king can only obtain the profits by recourse to equity.—Hardress, 495, 14; 2 Buls. 830. So that if the judgment did not bind the lands from entry and docket so as to entitle it to a preference over this mortgage, the defendant would be entitled to hold under it.

However, it is my opinion that the mortgage in fee to Acres in 1827, was valid as between the parties, and sufficient to divest the estate out of Mr. McBride, whether to the use of the alien or the crown, so as to prevent the subsequent judgment attaching therein as respects the legal estate, and that consequently judgment should be for defendant. We are not now called upon to decide whether the plaintiff, by redeeming the earliest or both the mortgages, could then hold the premises in fee under the sheriff's sale and conveyance.—St. 13 Geo. 3, ch. 14; 1 Burg. Colonial Law, 710-11, &c.

*Per. Cur.*—Judgment for the defendant.

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#### DOE EX DEM. SMITH V. MEYERS.

The words in a will, "I have already given to my son John lot No. 1," do not constitute a devise.

The description in a patent will be taken as correct, unless proved to be wrong by the clearest testimony.

In this case a verdict was rendered for the plaintiff, and a rule granted in the next term to shew cause why the verdict should not be set aside as contrary to law, evidence, and the charge of the judge.

It was proved at the trial, that Nos. 1 & 2 on the east side of the river Trent, in the first concession of the township of Murray were granted to James Smith. That James Smith was his eldest son, but that he was born in the United States; and that John Smith, the lessor of the plaintiff, was the first son born in the Province; under which fact the plaintiff contended he was heir at law.

The plaintiff contended that the land in question, and a house built thereon, was on lot No. 1, in the first concession of the township of Murray, and to prove this view of the matter correct, he produced an examined copy of the original map of the survey, by which he contended it appeared that lot No. 1 was nearly double the width of the other lots.

On the sketch, the lots in the second concession west of the river Trent appeared marked 1 & 2 in the second concession; a small corner in front with No. 2 in the second concession was marked 1; this was on the west side of the river, consequently No. 2 on the west side of the Trent in the first concession was in front of No. 3 in the second concession, No. 3 in the front of No. 4, and so on through the township. The



land on the east side of the Trent was not marked at all. The plaintiff contended, that all this land on the east side, being in front of Nos. 1 & 2, and of the corner marked No. 1 on the west side, and there being another lot No. 2 in the concession; that the whole of the land on the east side was No. 1. The defendant contended that the land on the east side was Nos. 1 & 2, and produced the will of the grantee of the crown, devising No. 2 to his son James (the eldest son and his daughters, who were aliens) and in which devise the devisor went on to say, "*as for my son John, having given him lot No. 1, first concession Murray, I do give, &c.,*" and passes to make other devises. The defendant proved title to lot No. 2, under a deed made by James Smith to him in 1820, of lot No. 2.

On the jury bringing in a verdict for the plaintiff, they were asked the grounds of their finding by Macaulay, J., who tried the cause; they answered that they found the house and land in dispute to be on lot No. 1, and that no adverse possession for twenty years was proved.

*Sullivan* shewed cause against the rule, and read several affidavits of surveyors as to their view of the width of lot No. 1, and argued, that as it was impossible to go by the words of patents in general, as to the contents of lots and the length of the boundary lines, the only proof which could be considered conclusive as to the contents of lots, or as to whether a given spot of ground was part of one lot or another, must be proof of the identical spot in which the stakes were originally placed; this is the view taken by the legislature, in the statute 59 Geo. III. ch. 14, in which the actual contents of the respective lots are entirely rejected as a guide in the subsequent surveying them, and even the directions in which the lines run are not to be governed by the description in the patents, but by the actual direction in which the township line was originally laid out, whether right or wrong. In this case, it would appear by the plan or map of the original survey, that one of the lots in the first concession must contain a double portion of land; all of them contain their proper quantity, allowing the double quantity to lot No. 1; and from the manner this lot No. 1 is marked, it appears to have been the intention of the surveyor to give the double quantity to lot No. 1.

The surveyors whose affidavits have been read on the part of the plaintiff, take the same view of the matter so strongly, that they absolutely swear to the point which is now in argument, and the jury have specially found the same on their oaths; and although this cannot make the fact or the law different from what it really is, it shews at least that the view taken of the matter by the plaintiff is not so manifestly

absurd as the argument on the other side would pretend to shew it. If then the land in dispute is on lot No. 1, it is plain the defendant has no pretence of title; the plaintiff has shewn himself to be heir at law, his brother being an alien, besides that the expression in the will as to the provision made for John, would be construed a devise at least for his life, which is all that is necessary to enable him to recover in this action.

*Solicitor-General, contra.*—My learned friend seems to have missed the plain and obvious construction of the instruments in evidence, by which they are all to be reconciled without having recourse to the manifest absurdity of making one lot double the width of the other, which construction is, that there are lots Nos. 1 & 2 on the east side of the river Trent, and lots Nos. 1 & 2 on the west side of the river. The patent grants lots Nos. 1 & 2 on the east side of the river; and were the construction contended for to be sustained, it would appear that lot No. 1 occupies all the ground on the east side, and would leave no place on that side for lot No 2.

James Smith did not take the land as heir of his father; he takes it by devise and is therefore in by purchase, which would be to the use of the king after inquisition found, so that lot No 2 cannot be considered to have descended to John as heir at law, even supposing James to have been fully proved an alien.

The case thus far appears too plain to make argument on any other point necessary; the plaintiff has shewn no shadow of title, and there is therefore no necessity to establish a title in the defendant. If the question were to be tried by the oaths of surveyors or other persons, there are affidavits filed on the part of the defendant fully as positive as those on the other side; but I cannot see that they can be taken into consideration in a question like the present.

ROBINSON, C. J., delivered the opinion of the court.

A verdict has been rendered in this case for the lessor of the plaintiff, and the defendant moves for a new trial on the ground that the verdict is contrary to evidence and the judge's charge.

It is clear that the rule should be made absolute, for it is impossible to conceive on what ground the plaintiff can have thought himself entitled to recover; it was clearly incumbent on him to shew a good *prima facie* title in himself, but he certainly altogether failed to do so at the trial. It was proved that the crown granted the premises in question, No. 2 in the first concession on the east side of the river Trent, in the township of Murray, to James Smith; then it was proved that this James Smith made his will after he was seised of this estate, and devised the premises to his children

in equal shares, excepting his son John, (the lessor of the plaintiff,) for whom he says he has already provided. This will is legally executed and stands unimpeached, and it shews a title out of the lessor of the plaintiff, and makes an end of the case. It is hardly necessary therefore to add, that if this will could be impeached, it would still follow from the evidence that the lessor of the plaintiff could have no title, because it was proved that after the death of the original grantee, his eldest son, James Smith, conveyed to one Ripson, who held possession under a contract made by a person of the name of Dean, with the original grantee, and whose interest he seems to have acquired ; this deed to Ripson was made in April, 1810, and under it Ripson and the defendant deriving title from him have been in possession, i.e., actual visible possession, and of course adverse to any claim John Smith could have for more than twenty years.

If it were necessary, under all these circumstances, to resort to this conveyance to maintain defendants in possession, we should have to consider the objection which has been urged against James Smith conveying as heir at law, on the ground that he is an alien and cannot inherit ; but I imagine it is clearly admitted, that the recent statute rendering valid estates derived through aliens, has cured this exception. As to the question that was attempted to be raised with respect to the space which lot No. 1 covers, the description in the patent is plain, and negatives the pretence advanced at the trial, that this No. 1 covers the ground which the defendant occupies under the designation of No. 2. If this were in fact so, it must be proved by the clearest testimony, for certainly the terms of the patent, and the map of the original survey, lead us to a different conclusion, and these were not shewn to be erroneous. Besides, if what the defendant occupies as part of No. 2 were in fact part of No. 1, the lessor of the plaintiff has shewn no title to No. 1, and must equally fail notwithstanding, for he has shewn no conveyance from his father to himself, and his brother was heir at law saving any exception on the ground of alienage, which exception, so far as it would otherwise have affected Ripson, or the defendant claiming under him, is cured by the late act. The words in the will, "I have already given to my youngest son John, lot No. 1, in the first concession of Murray, &c.," do not constitute a devise (*a*), and it is only on this recital in the will that the lessor of the plaintiff can found any claim, if all the obstacles to his recovery were removed.

Rule made absolute.



# THE UPPER CANADA JURIST.

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OLD SERIES.

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HAMILTON V. BURWELL.

Immaterial averments need not be proved, and variances in the statement of a libel not altering the sense of the part truly set out, are immaterial.

A verdict was rendered for the plaintiff in an action for a libel; at the trial the following points of nonsuit were moved and reserved.

That certain averments stated as matter of special inducement were not proved at the trial; First, it was stated in the declaration, that the plaintiff was duly authorised to practice physic and surgery according to the laws of this Province, and it was not proved by a license according to the statute.

Secondly, it was alleged in declaration, that the will of Mr. Hatt, deceased, was written by one Richard Cochrell, and the libel was alleged to have been published of and concerning the will; yet it was not proved by whom the will had been written.

Thirdly, it was averred that the plaintiff was married to Ann Draper Hatt, and the libel alleged to have been published of and concerning such marriage; the marriage was not legally proved.

Also, that the libel set out varied from the one proved, in the following particulars: in the first count the words "made and attempted" were substituted for "made an attempt," "professionable" for "professional," "have never" for "never have," "a proper attention" for "proper attention."

Second count. The libel was set out as continuous, whereas a large portion was left out in the middle of it,



"attend" was substituted for "attending," "station" was substituted for "estate," "when you can get no longer credit" for "when you can no longer get credit."

*Sullivan*, in support of the motion for nonsuit:

As to the want of proof of averments, it is a settled rule, that if a plaintiff burden himself with averments, however unnecessary to support his action, yet if they relate and are pertinent to it, he is bound to prove them, provided they cannot be altogether rejected as mere surplusage; and if in such averments he descends to particulars which are wholly unnecessary, yet such particulars have to be proved as alleged; of this nature is the first objection, namely, the statement of the plaintiff's being duly authorized according to the laws of this Province to practise physic, and saying he might have merely stated that he was a practitioner of medicine and surgery, and proved it in the manner he has attempted to sustain his more special allegation; yet having alleged that he was duly authorised, and set out in what manner, he is bound to produce the license from the Lieutenant-Governor, under the provincial statute, and no other evidence will answer the purpose.

The allegation is here meant as matter in aggravation of the libel, and it is no answer to the objection to say that if the averment were rejected, the action could be sustained, for in the first place it is alleged that the libel is published of the plaintiff, in his character as such physician and surgeon, and it is also meant in aggravation of the offence, that the plaintiff was slandered in that character. Thus in the case of *Heriot and Stuart*, 1 Esp. 437, the plaintiff declared that he was proprietor, editor, and publisher of a certain newspaper, he proved that he was the proprietor and editor, but not the publisher, and the variance was considered fatal.

In general, the place where words were spoken is not material, yet if the plaintiff state the place by way of aggravation, he will be bound to prove it (a). The case in 8 T. R. 303, is precisely in point; it appears from the decision of the court there, that if the plaintiff had contented himself

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(a) B. N. P. 5.

with stating that he practised physic, it would have been sufficient for him to have proved that he had practised, but having stated that he was a physician, and had duly taken the degree, he was bound to prove it (a). Although in the second count it is not averred that the libel is published of plaintiff as a physician and surgeon, yet the inducement applies to the whole declaration; each count has not separate matter of inducement, the whole is stated on the commencement, and the character is alleged as matter of aggravation to answer for both counts.

The general rule is, that all averments which are material, that is, which are connected with the charge, must be proved. A strong case on this point, 1 Chitty, R. 603, a case of libel for charging a constable with stealing a dead body; it was averred in the first count of the declaration what that conduct had been, and it was therein alleged that he carried the body to Surgeon's Hall; the court held it was necessary for the plaintiff to prove it, though he need not have burdened himself with such proof.

As to the other allegations not proved, and with which the plaintiff has embarrassed himself, perhaps unnecessarily, they are connected with the alleged slander, which is alleged to be published of and concerning the will of Mr. Hatt, and the marriage of the plaintiff with Miss Hatt; yet neither of these are proved; marriage cannot be proved by mere reputation, and it was not attempted to be shewn by whom the will was written. These are by the plaintiff connected with the libel, and must be proved (b).

The objection as to the want of proof of the innuendoes is fatal; there are so many not proved nor attempted to be proved, that the jury were left in ignorance, except by assuming them as proved, as to allusions and meanings averred in the declaration, which they must find on oath to be true, but which without evidence they could not possibly have known. This proof is always made regularly by witnesses, and there never was a case in which it was more necessary than this,

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(a) 1 Camp. 479; 3 Camp. 432; 1 N. R. 196; 4 J. R. 466.

(b) 5 T. R. 436; 13 E. 577; Stark. Ev. 2, 861.

where the whole writing was a series of obscure allusions, of the application of which those only intimately acquainted with the parties would judge (a).

The variances may not seem very material, but a very great variance is not necessary to defeat the action for libel. A literal mistake which is evident may not prove a fatal error, yet if a different meaning is given to a word it shews a different libel, and not the one declared upon; the word "attend" cannot mean "attending;" the word "station" cannot mean "estate;" and "getting no longer credit" and "no longer getting credit," have very different meanings: it is not merely the substance of the libel, but the libel itself which must be set out.

The setting out the libel as continuous, when in fact the one set out is composed of two different parts of the libel, leaving out all between them, as well as the other most material variances, makes the second count quite unsustained by the evidence; it is a different libel from the one in proof; it is not necessary that the difference of meaning between the libel set out, and the one proved, to make it fatal to the action, should be such as to make it more aggravated or less so; it is sufficient if the meaning is at all altered. A libel must be set out in pleading *secundem tenorem in hac verba*, or by equivalent words (b).

If the objection of variance be held good as to the second count, the objection as to the want of proof of special character applying more particularly to the first count, the case seems very strong for the defendant.

*Solicitor-General*, for the plaintiff:

The objections all seem to me unfounded; the special character of the plaintiff is sufficiently proved by the evidence that the plaintiff acted as a physician and surgeon; it is not alleged in the declaration that he had a license, and the manner of proving his professional character is that recommended in the books on the subject (c).

(a) Starkie on Ev. 2, 861.

(b) Camp. c. 390; 2 Salk. 417; 1 L. Raym. 414; Holt's R. 50, 348; 1 D. & R. 230; 5 B. & A. 615, S. C.; Styrkie's Law of Libel, 15, 314; McClell. 250.

(c) Stark. on Ev. 2, 373, 860.

But supposing it not sufficiently proved in this case, the second count of the declaration has no relation to the character of the plaintiff as a physician ; that part of the libel is left out, and the libel is not stated in that count to be published concerning the plaintiff as a physician, so that the averment may be altogether rejected as surplusage, without injuring the second count. And where an allegation can be altogether rejected, leaving the plaintiff a good cause of action on the record, the court will treat it as surplusage, on the principle *utile per inutile non vitiatur* (a).

But assuming that the special character of the plaintiff must be established to sustain this action, it is averred by the defendant in his libel ; where can be the necessity of proving what the defendant himself alleges ? There are abundance of cases to shew that when a libel admits a fact there is no necessity of proving it (b).

The action is sustainable without proof of special character ; the cases in which it is held necessary to be proved, are those in which the publication would not be libellous, unless the plaintiff were of some profession to which the libel particularly referred, as writing of a physician that he is a quack and the like ; in this case the imputations are so gross, that, written of a person in any situation they must be considered libellous ; the action is therefore maintained, particularly as to those parts of the libel not specially relating to the plaintiff in his character of a physician (c).

The same arguments will apply more strongly to the allegation of the marriage of the plaintiff with Miss Hatt ; this is also assumed in the libel itself, and therefore proved in the strongest manner (d).

The only inuendo that required proof in this case was, that the defendant was meant by the libel as the person charged ; there is no doubt that the declaration is overcharged with allegations not necessary, but when the identity of the plaintiff as the person libelled is once established, no one can

(a) 2 Doug. 664 ; 5 T. R. 496 ; 2 E. 52, 450 ; 8 E. 9.

(b) 3 Bing. 432 ; 4 T. R. 366 ; 3 M. & S. 369 ; 1 N. R. 196 ; 11 Pr. 235.

(c) 4 D. & R. 810.

(d) 3 D. & C. 113 ; 4 D. & R. 670, 422.



read the libel without drawing the same conclusions stated in the declaration. It seems to me, therefore that the defendant has not sustained any of his objections, and that the plaintiff is entitled to the benefit of his verdict.

SHERWOOD, J.—In this case a verdict was rendered for the plaintiff, subject to be set aside and a nonsuit entered, upon certain points reserved at the trial. This is an action on the case for writing and publishing an alleged libel reflecting on the character of the plaintiff as a physician and surgeon, as an executor and trustee, and on his moral conduct generally. The declaration consists of two counts; in the first count the plaintiff alleges, by way of inducement, “that he was duly authorised to practice physic and surgery according to the laws of this province;” and also “that he had been appointed an executor and trustee of the late Richard Hatt, by his last will and testament;” the first count then goes on to state among other allegations, that the defendant, falsely and fraudulently intending to injure the plaintiff in his credit and reputation, and also in his said profession and business of a physician and surgeon, and to cause it to be believed that he the said plaintiff had conducted himself fraudulently, dishonestly, ignorantly, injudiciously, and improperly, as such executor and trustee, falsely, maliciously, and injuriously composed, wrote and caused to be published, a certain false, malicious, and defamatory libel, of and concerning the plaintiff in the way and in respect of his said profession and business of a physician and surgeon, and in respect of his conduct as such executor and trustee as aforesaid; after which the plaintiff makes a statement of the alleged libel in the same count, and concludes in the following manner: “By means of the composing, writing, and publishing of which said false, scandalous, malicious, and defamatory libel by the said defendant, the said plaintiff has been and is greatly prejudiced in his credit and reputation aforesaid, and brought into public scandal, infamy and disgrace, and is suspected to have acted unskilfully, ignorantly, and injudiciously in the way of his said business and profession as aforesaid, and to have conducted himself dishonestly, injudiciously, and improperly in relation to the said estate of the said Richard Hatt, deceased, &c. &c.”

In the second count the plaintiff alleges, that the defendant, further contriving falsely and fraudulently to injure the plaintiff in his credit and reputation, and to cause it to be suspected and believed that he had conducted himself fraudulently, dishonestly, and ignorantly, as such executor and trustee under the last will and testament of the late Richard Hatt, composed, wrote, and caused to be published, a certain other false, scandalous, and malicious libel, of and concerning the plaintiff, and of and concerning and in respect of his conduct as such executor and trustee as aforesaid, and concludes by averring that by means of the publishing the last mentioned libel, he the plaintiff has been greatly prejudiced in his credit and reputation, and is suspected of having conducted himself dishonestly in relation to the estate of the said Richard Hatt, deceased.

At the trial of this cause, the plaintiff proved that he practised as a physician and surgeon in this Province, both before and after the publication of the alleged libel; but he gave no evidence of his having been duly authorised to practice physic and surgery according to the laws of this Province, and according to the special allegation to that effect in the introductory part of the first count. He proved, however, that he had been duly appointed an executor and trustee of the late Richard Hatt.

According to my view of the present case, it is only necessary to examine the following questions; first, can the plaintiff support this action so far as relates to his character of physician and surgeon, without proving a license to practice in this Province as required by the Provincial Statute, 58 Geo. III. ch. 13, s. 2. If the plaintiff cannot support this action as a physician and surgeon without such proof, can he sustain it as an executor and trustee on the evidence given at the trial.

I am inclined to think it was enough for the plaintiff to aver in general terms that he was a physician and surgeon, to entitle him to this action, and then the proof he adduced would have been sufficient; but as he thought proper to allege specially that he was duly authorised to practice physic and surgery according to the laws of this province, I am of opi-

nion he was bound to prove that fact by the best evidence the nature of the case would permit.—8 T. R. 307, and the case of *Pickford v. Gentle*, cited in a note to the same case. The best evidence would have been a license from the person at the head of the government, and that was not produced at the trial : I think the plaintiff failed in proving his character of physician and surgeon according to the allegation in the first count. A perusal of that count, however, clearly shews the plaintiff does not intend to limit his complaint to the injury done his professional character, but claims damages also for the aspersion of his character as a member of society generally, and as executor and trustee of the late Richard Hatt. If one count in a declaration contains a number of substantial and distinct charges, slanderous in their nature, and each of which would support an action if separately declared upon, I think legal proof of any one of them has always been held sufficient to support the action (*a*). I think there are three distinct allegations in the first count, of as many different injuries to the character of the plaintiff, that is to say, as physician and surgeon, as executor and trustee, and as a man unconnected with any particular profession or office whatever. The two latter allegations I think were proved, and I also think they are sufficient to sustain the first count without any reference to the first allegation (*b*).

The principal objection to the second count is, that two separate and distinct parts of the alleged libel are set out together in that count as if they composed one entire and continuous part of the whole publication, when in fact there is a great deal of other matter intervening between those two divided parts as they stand in the alleged libel, which was produced in evidence at the trial. This objection would certainly be of much weight, if the matter so omitted should be capable, when restored, of materially altering the sense of that part of the publication which is found in the second count, but it appears to me its insertion would not have that effect. The whole publication is made up of a succession of ironical

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(*a*) 2 Black. 790 ; 2 Esp. 491 ; 3. M. & Sel. 369.

(*b*) 4 Dow. & Ry. 810.

sentences, in the shape of advice or direction, very much diversified, and probably including almost every species of base artifice, despicable affectation, and infamous practices ; it contains no statements of facts or circumstances leading to any particular result, and consequently does not possess that unity and connexion of parts which an ordinary composition usually has. Many sentences might be declared upon as libellous independently of all the rest ; the unconnected style of the composition, therefore, renders the omission of a part of it in the second count wholly unobjectionable, because the sole object of that count is to obtain redress for the publication of a libel on the plaintiff in his character of executor and trustee, and as the part omitted does not relate to that subject, it could not qualify or alter the sense of the part set out in the second count if it were inserted with it. There are several verbal inaccuracies pointed out by the counsel for the defendant, but it appears to me they are either corrected or supplied by the context. I will mention two which seem to be entitled to more consideration than any of the others, and still I think them insufficient to set aside the verdict. In the second count, the word "attending" is put for "attend," and the word "state" for "estate;" the word "state" not only signifies "the community," "the public," but it also signifies condition, dignity, grandeur, estate, possession. The word "state" has undoubtedly been used in this instance by mistake ; the person who drew the declaration clearly intended to write "estate," but his meaning cannot be misunderstood by any one who reads the whole context. It must be evident he intended to insert the word that is in the original, that is "estate," and therefore I am of opinion such a trifling mistake, when corrected by other parts of the composition, cannot amount to a legal variance. In the case of *Loveland v. Knight*, reported in 3 Car. & Pay. 104, Bailey J., says, "Omitting a word, when the context supplies it, is no variance ; inserting a wrong word where the context corrects the mistake, is also no variance." From this doctrine the other judges did not dissent, and I am inclined to think it sound and applicable to the present case.



I also think all the other objections untenable; but it appears to me unnecessary to particularize the whole of them. Those already mentioned are undoubtedly the most weighty; the next to them in point of importance is the last, which is, that there is no evidence of the truth of the inuendos in the declaration, except so far as the general evidence goes to explain and prove them. I have examined the notes of the evidence given at the trial, and I think there was sufficient testimony adduced by the plaintiff to sustain the present action, so far as it relates to the general reputation of the plaintiff, as well as to his special character of executor and trustee. The *postea* must therefore be given to the plaintiff.

The Chief Justice and Macaulay, J., declined giving any opinion, having been engaged in the cause when at the bar.

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YOUNG, ASSIGNEE OF THE SHERIFF OF THE HOME DISTRICT, v.  
SHORE, BAIL (TO THE SHERIFF) OF BURRELL.

The court will stay proceeding on bail bond, where a delay of three years has taken place after the arrest, without any proceeding on the part of the plaintiff.

And the court will not hold the defendant to terms accepted by his attorney, at the suggestion of a judge at chambers, when he immediately abandons the judge's order.

In this case an application was made in Trinity vacation, at Judge's Chambers, for a summons to shew cause why the proceedings in an action on the bail bond should not be stayed, on the ground of laches and delay on the part of the plaintiff, It appeared on affidavit, that the defendant became bail to the sheriff in autumn, 1828; that no bail above had been put in, owing to an alleged misapprehension on the part of the defendant as to the plaintiff's intention to proceed. It did not appear by the documents before the Chief Justice; or before the court, when the bail bond had been assigned; no proceedings took place against the defendant until Trinity Term last, when this action was brought. In the mean time, the defendant in the original action had left the Province and returned, and the plaintiff had not declared or obtained any rule for time to declare in the original action. On the application at chambers, an objection was taken to the affidavit on

which it was founded, as not shewing that the bail were damaged by the delay, or that the application was exclusively on behalf of the bail without collusion. (a) The Chief Justice not being satisfied that the mere circumstance of delay entitled the bail to the relief desired, declined confirming his summons, and referred the defendant to the court in term time, intimating however his readiness to stay proceedings on terms. Upon this suggestion, the defendant's attorney accepted an order which he served on the plaintiff's attorney; it being a condition of such order staying the proceedings, that costs should be paid upon the proceedings that had taken place on the bail bond. These costs the plaintiff's attorney demanded, and they were refused, the defendant intimating his intention to abandon the order, in the belief that the court would grant redress upon more favourable terms. The plaintiff's attorney then took steps to obtain the Chief Justice's order for cancelling the one so granted to the defendant, which was done on cause shewn. On the last occasion the defendant's attorney urged his right to a more favorable consideration, and the plaintiff's attorney being apprised of his views, was left at liberty to proceed in or stay this suit till term. The plaintiff did proceed to judgment and execution.

In Michaelmas Term, *Ridout* obtained a rule to shew cause why the order of the Chief Justice should not be set aside, and why the proceedings on the bail bond should not be set aside for laches, or why they should not be set aside upon payment of costs, the bail bond standing as a security.

*Spragge* shewed cause: The arrest was in 1828; the assignment was then taken, but no suit was commenced on the bail bond until last Trinity. This is all the defendant can pretend to urge; he has not shewn that the bail have suffered from the delay; they have the same remedy now which they had originally against their principal. The case in 4 Taunt. 715, will shew the necessity of this statement. The affidavits on which this motion is founded, are not rightly entitled; they ought to have been entitled in the original action, and they are entitled in the action on the bail bond. (b) Besides,

(a) 2 Mod. 299: 1 Chitty's Reports, 127, and note.

(b) 7 Moore, 521; 1 Bing. 142; 1 B. & P. 337; 3 Bo. & P. 118; 2 Chitty, Rept. 109; Willis. 461; S. C. Barnes, 94.

this application has been made in chambers and refused ; the defendant took an order to stay proceedings on terms ; he cannot be allowed to go back of the terms in a manner agreed on by his acceptance of the order, for the purpose of obtaining a rule more favourable to his views. (a)

*Ridout contra* : The acceptance of the order in chambers was in consequence of the suggestion of his Lordship the Chief Justice ; it was taken not because it was agreed upon, but as the best terms that could be procured. On looking into the authorities, and seeing that this was a more extraordinary case of delay than any reported, I was convinced the court would afford relief without the conditions mentioned in the order. The refusal of a judge at chambers cannot be considered as binding the court. (b)

ROBINSON, C. J.—There has been a delay of three years, and during that time the plaintiff did not proceed, nor call in any manner upon the bail to the sheriff to put in bail above. I think he must be considered to have waived the security of the bail bond ; I was not satisfied at chambers that the mere circumstance of delay was sufficient to discharge the bail, and declined interfering unless by staying proceedings on payment of costs.

MACAULAY, J., after stating the case.—That part of the rule which relates to the order of the Chief Justice was inadvertently inserted, being struck out of the motion paper when moved ; and it is clear from the case of *James & Kirk*, 1 Chitty, R. 246, that in this respect the rule could not be sustained. There the plaintiff had countermanded notice of trial, and obtained an order to amend his declaration, on the terms of the defendant's having costs and an imparlance. He afterwards moved to rescind so much of the order as related to the imparlance. But Abbott, C. J., said it was an application to set aside an order obtained by himself ; that he need not have taken an order at all, but chose to do so in the terms prescribed ; that no sufficient reason was suggested for altering it, and that the rule *nisi* should be discharged with costs.

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(a) 4 Taunt. 715.

(b) 1 Chitt. R. 127 ; 3 M. & S. 299 ; 1 B. & S. 337 ; 3 B. & S. 221.

Besides, here the order has been rescinded by the Chief Justice himself on the application of plaintiff. See also 5 Taunt. 850; 1 Chitty, R. 129; 2 Moore, 255.

If there were no particular difference between this case and the above, it would seem that defendant's attorney having solicited, received and served an order to stay proceedings on terms, could not afterwards recede from it and claim a more advantageous rule upon the same or additional facts; but it appears that he was led to adopt the course taken upon the suggestion of the Chief Justice, and if the court sees that, from what occurred at the time, he was inadvertently induced to accept a remedy less beneficial than the Chief Justice might have granted; the court ought not to suffer any serious evil to ensue. The defendant's attorney upon consideration thought the step he had taken injudicious and premature, and abandoned it expressly on that ground, and in order to submit the original application to the court in term, of which plaintiff's attorney was aware, and the step was evidently not an advantage taken, but induced by the decision of the Chief Justice, and the offer made by him at the moment. If the court see that on the score of laches, relief might have been granted, and that defendant's attorney was led by the doubts of the Chief Justice to accept an order less advantageous than he was entitled to under the circumstances, it is still open to the court to prevent any fatal consequences.

In the first place, I am of opinion that unreasonable delay is of itself sufficient ground to stay proceedings upon the bail bond, and that a delay from December, 1828, to June, 1831, which delay arose to a certain extent from the plaintiff's attorney having abandoned the proceedings as appears by his affidavit, is unreasonable, and that therefore in this case proceedings ought to be stayed. As general rules, the plaintiff must declare within two terms, or the defendant, if a prisoner, becomes supersedeable or bail entitled to an *exoneretur*, (a) or plaintiff entitled to sign judgment of *non pros.*; and if the plaintiff do not declare within a year the cause is out of court; so that in ordinary instances the original suit in this case would have abated by the laches of

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(a) 2 N. R. 404.



the plaintiff. But from the case of *Piggot v. Trustee*, 3 B. & P. 221, it would seem that if the bail bond is assigned within the year, a right of action thereon subsists after that period; and (notwithstanding the case of *Sparrow v. Maylee*, 2 Bl. 876) the case of *Collet v. Wilson*, 4 Taunt. 715, decides that the plaintiff may proceed against bail after the year has expired, although it does not appear when the bail bond was assigned. (a) It is a well established rule, that all grounds of objection must be stated, and all facts within the knowledge of a party submitted upon the original application, (b) as well when made to a judge in chambers as to the court. (c) But amendments have been allowed in affidavits, in order to conform to the rules of court especially in favour of bail, as in 1 Chitty, R. 128; 7 Moore, 521; 3 M. & S. 299; and in *Haywood v. Ribbans*, 4 East. 309, upon a motion to set aside a *ca. sa.* against the defendant's bail, for irregularity in the original judgment being entered up without a rule for judgment after an award reducing a verdict, it was objected that the bail could not urge the objection (though held valid) in that collateral way. The principal and bail joined in the application, but the court held that while the original judgment stood, the proceedings under it were valid, and that the rule was conceived in wrong terms; that in strictness it should be discharged, but the court intimating that the irregularity was not waived, being unknown, and that another application would be sustained, and proposing that the rule pleading should be discharged without costs, and the original judgment and subsequent proceedings be set aside, that course was adopted and acquiesced in. (d)

It appears to me that the present embarrassment of the defendant in this cause has arisen out of the hesitation of the Chief Justice to grant relief to the full extent prayed, which I think he might have afforded, accompanied with an offer to give an order less beneficial, which though at first adopted was soon after abandoned and rescinded. Doubtless the

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(a) *Piggot v. Trustee*; *Sparrow v. Maylee*; *Collet v. Bland*.

(b) 7 T. R. 455; 1 East. 537; 1 H. B. 101-2.

(c) 1 Chitty, R. 126; 2 B. & A. 373, S. C.

(d) 1 Bulcot v. Hughes; 1 Chitty, R. 279; *Cock v. Brockhurst*, 13 East, 58-9

Chief Justice was willing to have kept it open to the defendant to apply to the court, and the defendant's attorney receded from the order on purpose to avail himself of the opportunity, and the plaintiff's attorney was well aware of his object; under such circumstances, and after so long a delay in the proceedings, I think that in favour of the bail the court exercise the soundest discretion in not holding the defendant estopped by the order accepted by his attorney, under the peculiar situation in which he felt himself placed, but in staying all further proceedings in this suit, on the terms, however, of the defendant's paying all the costs that have accrued in this action.

As to the objection made to the sufficiency of the entitling the defendant's affidavits, the case of *Kelly v. Brother*, 2 Chitty, R. 109, would shew that they may be entitled either in the original cause, or in that against the bail; and *Ham v. Philcox*, 1 Bing. 142, decides that after a regular assignment the affidavits should be entitled in the action on the bail bond (as in the present case), and not in the original cause, though otherwise if irregularly assigned. (a)

*Per Cur.*—The rule was made absolute to stay the proceedings on payment of costs.

#### ROCHLEAU V. BIDWELL.

The court will amend a *postea* by the judge's notes, and amend a judgment by the *postea*, *after an appeal allowed*, and reasons of appeal assigned. The verdict having been taken generally for the plaintiff on points reserved, and the *postea* being framed as if the general issue only had been pleaded, without noticing several other issues on special pleas of the Statute of Frauds.

A plaintiff cannot regularly confess his replication bad on demurrer, and enter a judgment for the defendant as to the pleas replied to thereby; but if such pleas be, by reason of the other issues, unimportant as to the plaintiff's right to recover, judgment need not be given on the demurrer.

This case was at the time of the present motion before the Court of Appeal, judgment had been entered as of Easter Term, 1 Will. IV., and a writ of *fiery facias* awarded against the goods, &c., of the defendant, who appealed, and a transcript of the record was sent to the court of the Governor in Council. In the vacation between the ensuing Trinity and Michaelmas Terms, the defendant assigned his reasons of appeal.

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(a) 6 Bing. 561; 7 Mird. 521.

The nature of the pleadings will appear by the following abstract :

The first count was on a special agreement for the purchase of land.

The second varied in some respects the statement of the contract.

The third was *indebitatus assumpsit* for the price of land sold and conveyed.

Fourth, a *quantum valebant* on the same consideration.

Fifth, common money counts in one.

Sixth, an account stated.

Pleas were—First, general issue.

Second, *actio non accrevit infra sex annos* to the whole declaration.

Third, the Statute of Frauds, i. e., that the contract was for an interest in land, and that there was no contract or note in writing.

Fourth, a similar plea to the second count.

Fifth, to the first count, Statute of Frauds, i. e., that the agreement was not to be performed within a year, and that there was no writing, &c.

Sixth, a similar plea to the second count.

Seventh, to the first count the defendant pleads generally, that the agreement therein set out was not in writing, or any note thereof, without referring in terms to the Statute of Frauds.

Eighth, to the second count a similar plea.

Replications : Similiter to the general issue ; to the second plea *actio accrevit infra sex annos*, referring like the plea to the whole declaration ; to the third and fourth pleas, that there was an agreement in writing signed by the defendant ; to the fifth and sixth pleas, that there was a memorandum of an agreement in writing ; to the seventh plea, part performance of the agreement, relying upon that to take the case out of the statute ; to the eighth plea, that there was a note of the agreement in writing, signed by the defendant.

Rejoinders : First joins issue on the *actio accrevit*, &c. ; second, takes issue upon the replication to the third, fourth, fifth, and sixth pleas ; third, a special demurrer to the replication to

the seventh plea ; fourth, takes issue upon the replication the eight plea.

The plaintiff joins in demurrer and this closes the pleadings.

A *venire* is awarded to try the issues and assess contingent damages on the demurrer, and according to the entry of the *postea*. The jury found that the defendant did undertake and promise in manner and form as the plaintiff had declared against them, and they assess the damages by reason of the not performing the promises, &c., over and above the costs, &c., to 431*l.*, and a day is given on the record to hear the judgment of the court on the demurrer ; afterwards the plaintiff comes and confesses that his replication to the seventh plea is insufficient to entitle him to maintain his action *in respect thereof*, and he prays judgment and his damages assessed on occasion of not performing, &c., to be adjudged to him.

The judgment is in these words : “ Therefore it is considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges, by the jurors aforesaid, in form aforesaid assessed, and also 5*l.* 4*s* 2*d.*, for his costs and charges, &c.

(This case was tried at the Midland District assizes, 1830, and the verdict taken subject to points reserved, on which, after argument, judgment was given in Easter, 1831, and the *postea* awarded to the plaintiff.

*Bethune*, in Michaelmas term last, moved for a rule to shew cause “ why the plaintiff should not have leave to amend the *postea* by the judge’s notes, by inserting the finding of the jury on each of the issues in fact, and thereupon to amend the judgment accordingly ; and also to amend the judgment roll by inserting the words ‘ by leave of the court for that purpose first had and obtained,’ before the confession of the demurrer by the plaintiff ; or to amend the said roll by striking out the confession of the demurrer by the plaintiff, and to obtain the judgment of the court upon the said demurrer.”

On rule *nisi* being granted,

The *Attorney-General* shewed cause.—The record is now before a higher tribunal, and out of the power and jurisdiction of this court ; while it is so, no proceeding can be had here in



the court below ; the same motion may as well be made when a cause is before the King in Council ; the court of appeal may, if they see fit, direct the record to be amended, but they have the case before them, and the court above having such a power is a strong reason why relief should not be applied for in this court. In cases of appeal from the quarter sessions in England to the King's Bench, which are quite analogous to the present, the case is sent back to the justices to amend while the proceedings are before the higher tribunal ; so it should be here, if the amendment under any circumstances can be allowed at this late period. The Courts of the Governor and Council and of the King and Council, are not courts of error, but of appeal ; the difference between which courts is well marked, 3rd Black. 56, which shews that in courts of appeal the court below are directed to amend their proceedings ; in courts to which an appeal lies by writ of error, final judgment is pronounced in the court of superior jurisdiction. How is a cause carried from the Court of the Governor and Council to that of the King and Council ? by petition, and not by writ ; so it was in the case of *Gray v. Wilcocks*, in which there was no writ, but only a petition. Then as to what is asked of the court by this motion to supply the finding of the jury in issues on which it does not appear a verdict has been given, and to which (although it may appear by the judge's notes their attention had been called) they notwithstanding may not have given, and for all that appears have not given any consideration. The verdict was general, as well as the assessment of damages, and upon the first count as well as the others, and yet there is a good plea actually sustained to the first count ; the plaintiff desires to separate this from the others, and apply the assessment of damages to those counts to which the plea does not apply. There are no cases to support amendments to this extent, that is to say, to avoid a plea in bar, which would be applicable to a count to which the plaintiff now wishes to apply his evidence. (a) The affect of this amendment will be, the

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(a) 3 J. R. 749 ; 1 H. Bl. 238 ; Doug. 731.

jury will find one way on an issue, which in another plea is admitted to be the other way. The evidence at the trial was not conclusive to support the finding of the jury; on the contrary it was quite unsatisfactory; the court ought, therefore, at least to allow the case to go to another jury, as a condition to be exacted on equitable considerations on relieving the plaintiff.

*Draper* in reply :

There is no point of modern practice clearer, than that the courts will allow of amendments of errors arising from misprision of their officers or mistake of the parties, when such amendments are in furtherance of justice, and in accordance with the facts of the respective cases in which they are allowed.—1 B. & P. 329. A general verdict was given on two counts, one of which was bad, but it appearing that the evidence applicable to the good count only, was that on which the jury founded their calculation of damages, the court amended the *postea*, by entering the verdict on that good count, though evidence was given applicable to the bad count also. The same doctrine has been acted upon in many cases, by which it will appear, that there has been a gradual relaxation of the ancient strictness in aid of equity.—Doug. 376; 2 Str. 1197; 1 Wils. 33; 2 T. R. 749; 1 Salk. 47-51, in which a verdict was amended by the notes of the clerk of assize—4 M. & S. 94; when a verdict was given for a sum exceeding the damages in the declaration, and judgment entered for the same, *and a writ of error brought* on the judgment, assigning it for cause, *the court allowed* the plaintiff to amend the judgment *and transcript* in a term subsequent to the entry, by entering a *remittitur* for the excess.—Bull. N. P. 230; 8 E. 357; 6 T. R. 199; 1 Wils. 306; Str. 1264; and as to amending the judgment, see 2 Stra. 1132, 1156, 786. When a defendant was found not guilty as to part (in case for words), there must be a judgment for him as to that part. But though error be brought, the record may be amended by the verdict.—2 Stra. 682; 6 T. R. 1; 3 M. & S. 591; 3 Burr. 722; 2 Str. 533; 1 B. & P. 329; 1 M. & P. 330; 7 B. & C. 819. This was a general verdict in a cause commenced in the Common Pleas for the plaintiff; the declaration contained several counts,

and the evidence applying to all, some of the counts being bad in law, error was brought in the King's Bench and the judgment reversed. The Court of Common Pleas, after argument in error, amended the roll remaining in that court by an amended *postea*. These cases support the present application fully: here the evidence was only applicable to the second count, on which the verdict is desired. The distinction attempted to be drawn between courts of appeal and of error, cannot affect this case, which is appealed by the common writ of error.

ROBINSON, C. J.—On a view of the pleadings, it is evident that the plaintiff has entered judgment erroneously, as if the declaration had been simply denied, and as if he had succeeded on the general issue, omitting wholly to notice the issue upon *actio non accrevit infra sex annos*, which applies to the whole declaration, and the issues upon the special pleas to the first and second counts.

The plaintiff, apprehending also that his entry of judgment is liable to another exception, has prayed for leave to make a further amendment in respect to the manner of disposing of the issue in law upon the seventh plea. He has confessed as to his replication on the seventh plea, that it is insufficient to maintain his action in respect thereof, and he has allowed judgment to pass against him upon the demurrer, and finding this to be excepted against in error, the plaintiff now moves to amend, either by adding the words "*by leave of the court*" to his confession of the demurrer (if I may use such a term), or by entering judgment for the defendant on the demurrer as awarded by the court. When the court gave the judgment, in Easter Term last, upon the points reserved in this cause at *nisi prius*, I remember distinctly that something was said by the counsel for the plaintiff above moving a *concilium* for arguing the demurrer, when it was observed from the bench, and I believe by myself in the first place, that it was scarcely worth while to proceed to an argument upon the demurrer, inasmuch as the case, upon the whole record, was finally decided and disposed of by the judgment which the court had just given upon the points reserved, for it was evident on an examination of the pleadings, that whatever might

be the judgment of the court upon the demurrer to this particular replication, the plaintiff would be nevertheless entitled to judgment on the whole record. The counsel for the defendant seemed at first to question this, but on his attention being called to the several issues, which he admitted he had never before particularly examined, he appeared to acquiesce that the verdict, with the judgment on the points reserved, must be decisive of the action ; and nothing further was said about arguing the demurrer, except that I think, either then or on some day afterwards, when the cause was mentioned, it was intimated, that although there could be no necessity for arguing the demurrer unless perhaps on account of costs, the parties were of course entitled to have it argued if they desired it. It is obvious, that nothing more was meant by the suggestion thrown out from the bench, than that the parties were not necessarily put to the trouble and expense of an argument upon an issue of law, which had become of no real importance to the action ; judgment, nevertheless, might and ought regularly (though I do not say necessarily) to have been prayed upon it, and would of course have been given if it had been prayed. It was not further moved in, however, and we now see in what manner the plaintiff has disposed of this issue in law. In order to be relieved from the objections which he conceives may lie against the entry of his judgment, the plaintiff has made application to amend, both as regards the issues in fact and the issue in law. The questions which arise upon the application are, whether these are such amendments as can be granted, and whether they can be granted by this court after the cause has been appealed to the Governor and Council, and after the reasons of appeal have been assigned. In the first place, as to the issues in fact, the application is to amend the *postea* by the judge's notes, by entering a verdict for the plaintiff upon the several issues in fact, and then to be allowed to amend the entry of the judgment so as to make it conform to the *postea*.

I have no doubt that we are bound to make these amendments in furtherance of justice, and that the appeal being brought, and errors assigned, upon the transcript of the record sent up from this court, is no reason why the amendment should be refused.



And here it is necessary to remark upon an argument that has been urged against these amendments, and which is altogether inapplicable to the present state of the cause. It is contended that the jury had too slight evidence before them to prove the existence of such an agreement as was necessary to sustain this action; that from thence equitable considerations arise, which should have an influence upon the court, in disposing them to allow or refuse the amendment, and at all events not to allow it upon other terms than that the cause should go down again to trial. The learned judge who presided at the trial, called upon the jury to decide upon the evidence they had heard, whether such writing as the plaintiff relied upon had been proved, and he reserved for future discussion here, in the broadest and most comprehensive terms, whatever legal objections might be raised upon the application of such a writing to the pleadings in this cause upon the whole record. The jury, as to the fact submitted to them, found for the plaintiff; the judge had intimated to them that the evidence was not direct and clear, but circumstantial and admitting of doubt; with this caution they found the affirmative of the question. If in coming to this conclusion they gave a verdict against evidence,\* or without sufficient evidence, or if their conduct was on any ground liable to exception, the obvious course was to move to set their verdict aside, within the same time and in the same manner as in other cases; the points of law were all dependent upon that finding of the jury; but because there were points of law, and because they were reserved, it did not follow that the verdict of the jury, so far as their judgment was concerned, was not open to question, in the same manner as if it had been given generally, and without any reservation of legal difficulties.

The plaintiff did not move against the verdict, but rested his case on the legal objections urged by him; to these legal objections we were necessarily confined in the argument of the points reserved, and it is equally necessary that we should confine ourselves now, in the first place at least, to the legal claim of the plaintiff to be admitted to make such amendments. At present I must assume the plaintiff to have recovered in a matter of contract upon a just cause of action,

and it is both just and reasonable that a verdict on the merits should not be defeated by errors in the form of entering the judgment.—V. G. Price, 432; the several statutes of amendment, and especially the statute 16 & 17 Car. 2, Cap. 8, shew that the legislature have been studious to prevent this, and the courts of law, departing from the unreasonable and inconvenient rigor of these rules in earlier times, have for many years past extended their power of amending (upon the principles of the common law) most liberally and beneficially, always taking care that the amendments shall be in furtherance of substantial justice.

There are numerous cases that fully support the present application, for amending the *postea* by the judge's notes, and the judgment by the *postea*; I mention only *Smith v. Fuller*, Stra. 783; 3 M. & S. 591; 4 M. & S. 94; 3 T. R. 659, 749; 6 T. R. 1-199; 7 B. & C. 819; 9 Price, 433; many others might be cited, but there can be no doubt that the plaintiff should be allowed to amend the *postea* and judgment.

But here a particular consideration arises; in the discussion of the points reserved, it became necessary for us to consider very particularly the evidence given at the trial, and its sufficiency to support the declaration. In the opinions expressed by us on that occasion, it was intimated that the contract relied upon was clearly in accordance with the statement in the second count; whether it tended to support the cause of action stated in the first count, was not absolutely determined; but it is necessary now to consider that point, because when we are called on to amend the *postea* by the judge's notes, we cannot direct a verdict to be entered for the plaintiff upon issues which we think the evidence does not sustain.

On comparing the evidence with the first count, I am of opinion that we cannot direct a verdict to be entered for the plaintiff on that count, nor of course upon any of the issues relating to it; but that we should direct the *postea* to be amended in such manner, as to give the plaintiff a verdict upon the issues relating to the second count.

In the argument, a good deal was urged with respect to the nature of our Court of Appeals, as distinguishable from a court of error; it was urged that from thence there arose a difficulty in the way of an amendment, but I cannot see this difficulty; whenever an appeal does lie from this court, I conceive it must necessarily be in the nature of error, from the very constitution and course of this court, a court of record of superior jurisdiction acting according to the course of the common law.

But I wish to guard myself against being supposed at present to admit, that an alleged error on the record in a case in this court, to be gathered only from inspecting the record, and not ascribed to any erroneous judgment actually pronounced by this court in a matter expressly before them, either by motion, demurrer or special verdict, can be made the ground of an appeal; I have long had a different impression, and if it were necessary would express the grounds of it, although it is possible a more extensive search into that question might induce me to change my opinion, which I have never had occasion particularly to examine, and in which I am not yet fixed.

SHERWOOD, J.—The counsel for the plaintiff makes two objections to the proposed amendments; in the first place he alleges, the Court of Appeals only can amend the record, and if they deem it proper to allow any amendment, they should send an order to this court to amend it; with respect to this objection it appears to be untenable; I think an appeal from this court to the Court of Appeals in this Province, analogous in its nature and effect to a writ of error returnable in the Exchequer Chamber in England upon a judgment of the Court of King's Bench there; but whether the authority of the Court of Appeals here is equal to that of the Court of Appeals in England to which I have alluded, is not necessary to examine. The Court of King's Bench in England may amend the record of a judgment in that court, after a writ of error has been sued out.—3 T. R. 659, 749; 7 B. & C. 819; 9 Price, 432. By the provincial statute 34 Geo. III., ch. 2, sec. 1, the Court of King's Bench in this province possesses the same powers and authority within its jurisdiction, which

the Court of King's Bench possesses in England, and therefore can make amendments in their proceedings, both before and after judgment, to the same extent; the foregoing cases would be authorities for making a similar amendment by the Court of King's Bench in England, if in the exercise of a sound discretion they should deem it necessary for the due administration of public justice to do so, and therefore I conclude they are sufficient authorities for this court.

The second objection is, that if this court possess competent authority to make the proposed amendment, the circumstances of this case will not warrant such a proceeding. I incline to think differently. From the report of the learned judge who tried the cause, I think the evidence applies to the second count, but its applicability to any other count is exceedingly doubtful. My present opinion is, it does not apply to any other than the second. The verdict recorded for the plaintiff, on the plea of the general issue, should be restricted to the second count, because the testimony, in my opinion, clearly sustains that count; a verdict should also be entered for the plaintiff on the second, sixth, and eighth pleas, and for the defendant on the fourth plea, and on all the counts in the declaration except the second. I am also of opinion, that the costs should be retaxed, and to such amount only as the plaintiff would be entitled to if the declaration consisted of but one count. The counsel for the plaintiff did not apply to the court to enter the general verdict on one count only; but I think it the duty of the court to order the verdict to be entered for the plaintiff on that part of the declaration which the evidence supports, and for the defendant on such part of the pleadings as it does not sustain. The foregoing arrangement will, in my opinion, produce that result, and then it will remain for the Court of Appeal to determine whether the action is maintained by the pleadings which appear upon the record.

MACAULAY, J.—In opposition to the application on the part of the plaintiff, it is contended:

First, that by the appeal, the cause is taken entirely out of the power and controul of this court.



Secondly, that the amendments prayed cannot be made at this late period, were the record still subject to the jurisdiction of the court.

Thirdly, that even if otherwise, the amendments prayed cannot be granted, as the court will not either allow an entry of a confession of demurrer with or without *the leave of the court*, or partially open a judgment (subsisting still in other respects), in order to dispose of a demurrer by giving judgment thereon, or set aside the judgment to enable the plaintiff to pursue a more regular course in entering it again.

My sentiments, as to the course of proceeding in the Court of Appeal, are contained in the written notes of my opinion in the case of *Monk v. Powell*, in that court, to which I still adhere, and to which, being left in possession of that court, I would refer.

I regard the Court of Appeals as in effect a court of error, for the correction of such erroneous judgments in this court as might be corrected upon error from the Court of King's Bench by courts of error in England. I at the same time, however, conceive that in point of mere practice, the Ordinances of Quebec should be adhered to as far as they prescribe rules applicable to the altered constitutions of our courts of civil and criminal jurisdiction.

Where the ordinances afford no guide, the principles which govern other courts of similar constitution and jurisdiction may be resorted to, as was observed by the Court of Exchequer Chamber, a court of error created by statute 27 El. c. 8, without any declared system of practice.

It will be found on comparison, that the course of proceeding in the Exchequer Chamber or the House of Lords, formed the basis of the regulations imparted by the Ordinances of Quebec, and afford ample aid where they fail. The Court of Exchequer Chamber being created by statute, as well as our Court of Appeals, I am disposed to adopt the practice of that court, in preference to that of the House of Lords, though as a strictly appellate jurisdiction the latter seems more appropriate.

The writ of appeal issued in this case, agrees in point of form with the writ of error in the Exchequer Chamber. The original record is not transmitted in obedience to the writ,

but only a transcript of it, and though the writ of error supercedes any execution pending the appeal, the roll itself remains here.

It was never contemplated that the Court of Appeals should withdraw all future jurisdiction from this court, and issue execution, &c., from thence; the clause of the provincial act 34 Geo. III., chap. 2, does not obviously so intend, for it merely declares that an appeal shall lie in certain cases, and that upon perfecting bail, &c., execution shall be stayed in the original cause.

I do not conceive it necessary, in any view of the point, to enter into any critical discussion of the alleged difference in point of object, jurisdiction, and practice, between courts of *appeal* and *error*; for as respects the right of appeal from this court, I regard the terms as synonymous, as formerly in Ireland and Wales there was an ultimate resort from the courts of justice there to those in England, by writ of error in the nature of an appeal.—Hale's His. Com. Law, 198; and see 3 Bl. Com. 55, 454; Hargrave's Pref. to Hale's Jurisdiction of the Lords; Sellon's Introduction and Title Error.

If examined, appeals will be found to have originated in criminal cases; and as respects civil suits, a distinction between appeals and error will be found to arise out of the difference between courts of record and not of record, interlocutory and final decrees &c.

Besides, the statute creating the court clothes it with all such *powers* and *authorities* as by the law of England are incident to a superior court of civil and criminal jurisdiction; and the true question is not, in what light the Court of the Governor and Executive Council and of the King and Council, are to be regarded as courts of appeal or error generally, in which an appellate jurisdiction may be exercised from various inferior tribunals, both of record and not of record, but as an appellate jurisdiction from this court in particular. It is urged as an argument, that diminution of the record cannot be alleged in the Court of Appeals, but I see no reason why it should not. The record is transcribed by the plaintiff in appeal, and it would not seem reasonable that the appellee or respondent should have no opportunity to assert its inaccuracy.

Diminution is either of the body of the record, or of its outbranches, as of the original writ, warrant of attorney, &c. If the whole record be not certified, the party that sues the appeal may allege diminution; but diminution cannot be alleged contrary to the record which is certified; omissions only can be supplied (a). And formerly a writ of diminution issued from the court of error, and although strictly diminution can only be alleged, and the *certiorari* had by the parties, before *in nullo est erratum* pleaded, yet the court, to inform their consciences, may award a *certiorari* at any time to amend the record (b); and it will be seen in practice that amendments are usually made when authorised without the expense of a *certiorari*.—1 Salk. 49.

The alleged want of privity between the Court of the King in Council and this court, presents no difficulty in my opinion. Amendments may be only sanctioned while the cause remains with the court of immediate appeal. The appeal to England is from the decision in appeal here, and not from the decision of this court. The judgment may be quite opposite, and the cases would shew, that though perhaps diminution of the record in this court could not be alleged before the King in Council (c); yet through the intervention of the Court of the Governor in Council it might be effected (d). And it will be found that in practice amendments are made in England upon motion only, without any formal allegation of diminution or any *certiorari*.

I am of opinion, therefore, that amendments may be granted in this court after an appeal in error, to the same extent and under the same circumstances as in the King's Bench in England, after error in the Exchequer Chamber.—Stra. 1132, 837; Yel. 118; 1 Ld. Ray. 427; 34 Geo. III. chap. 2, sec. 14; 2 Geo. IV. chap. 1, sec. 24; these provincial statutes provide that the Statutes of Jeofails shall be adopted and they are declared valid and effectual for the same purposes as in England.

(a) 2 Sellon's Prac. 377; Impey's K. B. 725.

(b) Bac. Ab. Error E.; 2 Roll. Rep. 471; 1 Salk. 270; Hard. 119 2 Sal. 270.

(c) Tidd. 1224, n. b.

(d) 3 M. & S. 591.

When proceedings are entered on record, the court, it is said, will amend no further than is allowed by these statutes of amendments.—Tidd. 768. But under them an amendment may be made at any stage of the proceedings, and those things which were amendable before error brought, are amendable afterwards so long as diminution may be alleged, and a *certiorari* awarded; upon error to the King's Bench from the Common Pleas, in either court; in error from the King's Bench to the Exchequer Chamber it is made in the King's Bench, which differs from the Common Pleas, because the latter is supposed to send up the very record, while the former sends only a transcript. Amendments are made after error brought, *in nullo est erratum* pleaded, and argument.—2 Stra. 837; 5 Burr. 2730-1; 3 T. R. 350, 659, 749; 7 T. R. 474, 703; 4 Taunt. 588; Pop. 102; Plo. 162; 3 M. & S. 591; Hard. 505; Tidd. 771, 8th ed.; 1 Bos. & P. 65.

It appears from the case 3 T. R. 659; 3 B. & P. 65; and other authorities, that after error brought, owing to the want of a finding of the jury upon some issues of fact, the *postea* and roll may be amended by the judges.—2 Stra. 1197, and cases cited in note; 2 Stra. 786; 5 T. R. 577; 3 B. & P. 65; 6 T. R. 659; 4 M. & S. 94; 1 Marshall, 180; 1 H. B. 643; 7 B. & C. 819; 3 Bing. 334; 7 Y. & J. 376; 3 Bing. 346.

From all which it appears to me, that the *postea* may be amended by the judge's notes after error brought, but I have no objection to a special entry of whatever amendment is authorised and made, to enable the defendant to appeal this proceeding, as was observed 7 B. & C. 835. This disposes of the first and second points.

As to the third point :

It will be found that in amendments of judgments under the statutes, after the term of which they were entered, the defect to be corrected has been attributed to the misprision of the clerk, and the court have been liberal, with a view to the justice of the case, in considering defects as liable to be so regarded.

The first count in this case is special in *assumpsit* for the sale of lands, to which the plaintiff pleads—

First, the general issue.

Secondly, the Statute of Limitations.



Thirdly, the Statute of Frauds respecting sales of land, &c., setting out the statute, and pleading that there never was any such agreement, undertaking, or promise, as mentioned in the said first count, or any memorandum or note thereof in writing, signed by the defendant or any other person by him authorised in that behalf.

Fourthly, setting out the Statute of Frauds respecting agreements not to be performed within a year, and negating any written agreement, note, or memorandum in writing, as in the third plea to the first count.

Fifthly, without referring to any specific clause of the statute, negating, written agreement, or any note or memorandum thereof signed by the defendant.

Upon the first, second, third, and fourth pleas to the first count, issues of fact were joined.

The replication to the third plea, averring that the agreement was in writing, signed, &c. The replication to the fourth plea, averring that a memorandum or note thereof was made in writing, and signed by the defendant, upon which issues of fact a verdict was found for the plaintiff, subject to the points reserved, which have since been disposed of in the plaintiff's favour. *To the fifth plea pleaded to the first count, the plaintiff admitting that there was no agreement, memorandum or note in writing, signed, &c., pleads part performance, &c., as nevertheless entitling him to his action on this count, to which the defendant demurred and the plaintiff joined in demurrer.*

The declaration contains one other special count, the second, to which similar pleas are pleaded, and upon all of which issues are joined to the contrary; also four common counts, to which issues in fact are joined to the contrary likewise. A general verdict was entered for the plaintiff on the whole record, subject to the opinion of the court upon certain points reserved, on the consideration of which, the court were of opinion that the plaintiff was entitled to recover. Now that an application is made to amend the postea by my notes, it seems to me essential to consider what entry my notes would authorise. They shew that a general verdict was taken *sub modo*, to depend upon the opinion of the court upon points reserved; in framing the postea, therefore, by those

notes, it is indispensably necessary to inquire the results of the points reserved, for they might have terminated in the defendant's favour in toto, or to a partial extent; and though *prima facie* a general verdict is to be indorsed, it is after the points have been disposed of to be moulded accordingly. It is necessary, therefore, that the instructions of the court should be given as to the form which such general verdict should assume, upon the decision of the points reserved, for the application of the evidence to the record was reserved, subject to discussion and consideration.

I was of opinion, upon the argument, that the evidence did not apply to the third and subsequent counts, owing to the subsistence of a special executory agreement; and I did not think that the facts found by the jury and proved, supported the first count; but I conceive they did sustain the second count.

A difficulty arose in my mind as to the issue under the third plea to the second count, which is mentioned in the twenty-third page of my notes to the case. Subsequent reflection has not convinced me that the third issue is supported, and as my opinion was founded upon the assumption, that if a verdict were entered for the defendant upon that issue, the plaintiff would still be entitled to judgment upon the whole pleadings under the second count, I think it better to adhere to that view, and then the issues will be disposed of consistently with the evidence, by entering a verdict for the plaintiff on all the issues under the second count except the third, and upon that for the defendant; and afterwards a general judgment for the plaintiff upon the second count.—Hob. 53; 6 Holt. 276; 1 T. R. 125; 4 E. 506; 10 E. 87; Stephen's Pl. 140, 182.

Upon that part of the rule which relates to an amendment of the *postea* by the judge's notes, by inserting the finding of the jury on each of the issues in fact, I think such amendment may be made, and that it must be made in obedience to the event of the points reserved. My opinion of the legal effect and application of the evidence is, that a verdict should be entered for the plaintiff on the first, second, and fourth issues, under the second count

only, for the amount found ; and for the defendant on the third issue on the second count, and upon all the issues in fact under all the other counts ; and that a general judgment should then be entered for the plaintiff for the amount found under the second count only.

The extent of the entries in the plaintiff's favour must, however, depend on the sentiments entertained by the majority of the court. However, it is now apparent that in my view of the case, the demurrer was immaterial, and not important, as respects the plaintiff's general right to recover.

In Hob. 56, it is said "if it were a demurrer upon a "matter of law, though the parties will join upon some "one point upon which if it stood alone judgment should "be given for the one party ; yet if upon the whole record "matter in law appear why judgment should be given "against the said party, the court must judge so, for it is "the office of the court to judge the law upon the whole "record, and the consent of the parties cannot prejudice "their opinions, or quit them of their office on that point."

The above authority is rather applicable to the judgment to be pronounced upon the first count, should the evidence at the trial be held sufficient to support it ; the facts admitted not to exist under the fifth plea being established upon the trial of the issues under the others ; at the same time, the inconsistency of the plaintiff in denying in one replication, and admitting in another, both relating to one count in the declaration, the same facts, is obvious ; see also 2 T. R. 237, 391 ; 3 B. & A. 546 ; 3 Bing. 381.

See also the following references as to the effect of different issues in law and fact, found for opposite parties. —Tidd. 799 ; 1 Saund. 90, n. 1 ; 2 Arch. Prac. 12 ; 2 Bur. 753 ; 2 Wils. 85, s. c. ; Mansel on Demurrers, 94, 112.

*(To be continued.)*

# THE UPPER CANADA JURIST.

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UPPER CANADA KING'S BENCH REPORTS.

OLD SERIES.

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ROCHLEAU v. BIDWELL.

*[Continued from our last.]*

The court are not called upon to anticipate the effect of the present application upon the ulterior proceedings in appeal; but it would seem to follow, that if upon the whole record the plaintiff is entitled to judgment, the judgment may be sustained although the demurrer was not regularly disposed of. 6 Taunt., 625; 2 Mar., 304-8; 2 Chitty R., 30 & n. S. C., shew that a court of error may affirm a judgment as to one count, and reverse it as to another. But 1 T. R., 151, 3 T. R., 435, and other authorities, present the difficulty, that general damages have been assessed. However, confining consideration to the first count, it is not from the authorities at all clear, that upon the whole record, whether exclusively restricted to that count, or extended to the other pleadings, the plaintiff is not entitled to judgment without regard to the result of the demurrer, in which case it would seem immaterial, and therefore not entitled to regard upon a review of the sufficiency of the judgment in point of substance; and were it otherwise, cases might be cited in which a plaintiff has been allowed to waive his judgment upon a particular count on finding it defective, as in 2 Bos. & P., 50. However, as I entertain the opinion that according to my notes, and the legal effect of the evidence applied to the record, the verdict should be entered upon the second count only, the first is in my estimation of no moment. I think the verdict should be given for the



plaintiff on the first, second and fourth issues; and for the defendant on the third issue, under the second count. 2 Bac. Ab., 227-8; 1 Ld. Ray., 355-6; 2 Ld. Ray., 825.

This brings me to the specific object of the latter part of the plaintiff's application, which is to insert the leave of the court to a confession of a demurrer, or to obtain the judgment of the court thereon. To procure a judgment of the court upon any part of the pleadings, it appears to me the whole judgment must first be set aside; it cannot be partially opened as desired. After final judgment, amendments may be made under the statutes, but there must be something to amend by; and the application is not to amend, but to exercise a judicial cognizance of the pleadings. An amendment is always discretionary, and is merely intended to correct inadvertencies, and render that regular which without such aid is objectionable; but to dispose of a demurrer, a *concilium* must be moved, argument had, &c., in no respect resembling amendment. Were the whole again opened, it remains a question how the judgment on the first count should be entered if the demurrer were sustained. But the court is not asked to set aside the judgment, but to strengthen it by additional entries on the roll, of which a judgment on demurrer is to form a part; I find no authority to sanction such a course. Then as to the former part of the application, after the imperfect *postea*, continuances are inserted; and in Easter Term, 1831, the parties come by their attorneys, when the entry of the confession of the insufficiency of the replication to the seventh plea is made, followed by the general judgment in common form in favor of the plaintiff.

Now, from the plaintiff's admission, that his replication to a good plea in bar is insufficient to sustain his action, there is an incongruity in his nevertheless obtaining judgment on the same cause of action, and such incongruity would not be helped by the previous leave of the court being inserted, independent of the novelty, and to me, seeming irregularity of such a course. If the plaintiff conceives a judgment may be sustained in this court, although the demurrer should be decided against him, he should have entered an award of judgment in the

defendant's favour therein, and then the final judgment in his own favour upon the whole record; an amendment of this nature has not been solicited, and I do not think the court can authorize the insertion desired.

In order, however, to enable the parties to discuss in the higher court the materiality of the demurrer after the event which has attended the issues in fact, involving of course the consideration how far it is necessary that it should appear upon the record to have been disposed of by judicial adjudication one way or the other, I see no objection to allowing the plaintiff to strike out of his rule the confession of the demurrer, including the passage from "confesses" to "prays," when the record, after the amendments authorized, would appear according to the real state of the proceedings in this court.

It does not appear that it is always necessary that all issues should be determined by express entries on the record, when they become immaterial by the event of others; but upon that point, as arising in the present case, I give no express opinion; suffice it to say, that if the judgment of the court must be given upon the demurrer, I do not see how it can be consistently done without first setting aside the present judgment in toto.

The plaintiff must pay the costs of the motion, and of the amendments made, and also of the proceedings in appeal, in case the defendant elects to proceed no further. (a)

*Per Cur.*—Rule made absolute; that the *postea* should be amended by entering a verdict for the plaintiff on the issues to the second count, and for the defendant on the other issues in fact; and that the judgment should be amended according to the awarded *postea*, on payment of costs, &c.

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(a) Mansel on Demurrers, 161.

## McDONELL V. RUTTER.

This court will set aside a recognizance roll not warranted by the proceedings after *comperuit ad diem* pleaded to an action on the bail bond.

*Cassady* moved to make a rule absolute, obtained last term, to set aside the recognizance roll, for variance between the roll and the bail piece on which the roll was founded.

First, because the bail piece was not entitled in any cause, nor of the term of which the bail was put in ; nor does it state the county or district in which the bail was taken.

Secondly, the action is under the provincial statute by original, and the recognizance has not been taken in a penalty.

Thirdly, that no notice was given of the putting in of any bail, or filing of the bail piece in the original cause.

Fourthly, that the bail was taken in a manner different from that stated in the record.

The *Solicitor-General* shewed cause.

They must take some other means of remedy besides a motion of this kind, which is now made too late. An action has been brought, and is now pending, on the bail bond on this roll ; *comperuit ad diem* is pleaded, and if they have any objection let them reply it.

*Washburn* in reply.—The recognizance roll is not warranted by the proceedings ; it was not made up until it was necessary to plead to the action on the bond, and then the defendant makes up a roll to suit his purpose ; there is no replication which will avoid this roll so long as it remains a record of this court ; a motion of this nature is the plaintiff's only remedy.

ROBINSON, C. J.—The first objection is founded in error, as the bail piece, I find on inspection, is entitled in the cause. As to the second and third objections, as to the term and district, sufficient appears from the caption. The bail cannot say this is not a sufficient recognizance, though the plaintiff need not have accepted it if not strictly regular. It is a recognizance sufficiently certain and binding upon them (so far as these objections are concerned), and the plaintiff not excepting, cannot treat the bail piece as a nullity on such grounds. The criterion, I think, is whether the bail have

given such a recognizance as they can legally be sued upon. The record of the recognizance is warranted by the recognizance itself on both these points. The bail is in the recognizance roll rightly stated to have been put in in York, and the statute declares it shall have the same effect.

As to the fourth objection, is not this recognizance good by sec. 11 of our statute, though not in a penalty?

As to the want of notice, I think that objection fatal; I think the record may and ought to be set aside on that ground, that bail is taken in a manner different from that stated in the record. As to variance in the statement of the condition, the recognizance is good; the roll bad, being contrary to our statute, under which the recognizance should bind without restriction as to amount, and on that ground I think the recognizance roll should be set aside; if it were not, the plaintiff would fail on the issue of *comperuit ad diem*, for this is not bail above according to our statute, but essentially defective as to their undertaking, so that there need be no hesitation in making the rule absolute.

*Et per Cur.*—The rule was made absolute with costs; i. e., the present proceedings set aside, and the action against the bail on the bond stayed and the bail allowed.

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#### MALLOCH V. GRAHAM.

An action may be maintained for words imputing perjury committed in Lower Canada.

This was an action of slander; the declaration charged words of perjury, but it appeared in evidence on the trial, that the perjury was charged to have been committed in Lower Canada. There was a verdict rendered for the plaintiff at *Nisi Prius*.

*Sullivan* shewed cause, on a rule *nisi* obtained last term, to set aside the verdict, (on the ground that the perjury, if committed in Lower Canada, would not subject the plaintiff to punishment by any law, nor in any court, in this Province.)

Although the doctrine maintained by the defendant is true in some respects, and although to maintain an action without special damage stated, it is necessary that the defendant should have charged the plaintiff with some crime for which



he would be punishable in our courts of criminal jurisdiction, yet on considering the principles on which the action of slander is founded, and on which damages are given, it will be found that the action is not maintained on account of *the actual jeopardy* in which a party is placed by a charge being made against him, nor the damages assessed on the principle or proof that he has been placed in such jeopardy; it on the contrary will appear, that this rule of law, as to verbal slander, is merely enforced, as giving some certainty to the law, and as defining the magnitude of the crime which a slanderer must impute, before he can be considered accountable for verbal slander. If this view of the question can be sustained, and it must be confessed there are few or no authorities directly in point, it is plain that it is no matter in what country, or under what jurisdiction, a crime is said to have been committed, provided that if committed in this province it would subject the criminal to punishment in our courts of criminal jurisdiction.

*Solicitor-General* in reply.—However reasonable the doctrine maintained on the part of the plaintiff may appear, it is not supported by the law of England, nor the cases adjudged in actions of this kind. Thus we find that calling a woman a whore, though exceedingly detrimental to female character, is no slander which the law will notice, unless it is said of a woman in London, where by custom or a municipal regulation it subjects a woman to punishment. In a court of criminal jurisdiction, it will be seen, that all the authorities on the action of slander support the doctrine, that the crime charged is such as would, if committed, subject the criminal to punishment in a court of common law; for though the ecclesiastical or canon law is declared to be a part of the common law of England, a charge of a crime merely cognizable in an ecclesiastical court, is not a slander which the law will notice. A direct decision in a case like the present is much to be desired, as there are no cases directly in point on the present question.

ROBINSON, C. J.—I am of opinion that the action of the plaintiff is sustained in law, notwithstanding the objection raised, that slander does not lie for words which impute a crime committed in a foreign country, and not capable of

being prosecuted in our courts. In early times, the anxiety of the courts to restrain actions for words upon frivolous pretexts, and at others to afford protection to character against imputations which were necessarily degrading, though their legal character might be doubtful, produced a multitude of decisions apparently at variance with each other, and many that were really so; but among the cases none has been cited in argument, and I am not able to find one, in which it has been determined that words are not actionable (without proof of special damage), unless they impute some crime for which the person slandered is amenable to our laws. There are many cases which in principle are against this position) for it has been at several times determined that an action will lie for words charging another with a crime which has been pardoned after conviction, or for which he had been tried and acquitted, and this even when the words spoken expressly imported that they were spoken under these circumstances, as when it was said A. B. has been whipped for stealing, or A. B. has been tried for felony, and would have been hanged had it not been for the swearing of C. D., &c. This class of decisions establishes that it is not necessary the words should charge a crime for which the person slandered may yet be placed in jeopardy. The principle, from a view of the several decisions, seems rather to be, that words, to be actionable in themselves, must impute offence or conduct degrading to the character, and that to determine whether the conduct imputed be such as to claim that appellation, the criterion has been adopted, that the words must amount to a charge of offence punishable by law with imprisonment or other corporal punishment,—that the offence must be of that description, not that the person slandered must, at the time of the words spoken, be in fact amenable to trial here for the very offence imputed to him.

These words import a charge that the plaintiff committed perjury in Lower Canada; now perjury is a crime infamous everywhere, it is *malum in se*, and must in the very nature of things be a disgraceful crime against the laws of every country that has laws. We know that by the criminal law of England, it subjects those guilty of it to an infamous

punishment, and we also know that by a statute of Great Britain, which we are bound to notice, the criminal law of England is the criminal law of Lower Canada.

Besides, it is to be considered that by a provincial statute of our own, malefactors (which the statute explains to mean persons who have committed "felony or other crimes of a high nature,") escaping from Lower Canada, may be apprehended in this province, and sent there for trial; so that we cannot say that the plaintiff in this case may not be placed in jeopardy by being charged with committing perjury in Lower Canada.

As to the propriety of setting aside the verdict on other grounds, I have considered that maturely, but do not find that we can do so on any sufficient pretence. The evidence of Burch does, we think, support the words charged, and there is a good deal to corroborate it. The case was not left to the jury in a manner unfavorable to the defendant, but was submitted to their judgment upon the whole evidence. The verdict and damages are considerable, but if we are bound to consider the action sustained, such damages cannot be called outrageous, and the litigation ought in a case like the present to end with the verdict.

SHERWOOD, J.—I agree with the Chief Justice as to the disposal of this motion, but without expressing any opinion on the main point of difficulty; this appears sufficiently on the pleadings to become the subject of a motion in arrest of judgment, if the defendant shall be advised to proceed in that manner.

MACAULAY, J.—I am of opinion that the criterion is not whether the party charged would be rendered liable to punishment if the charge were sustained, but whether the crime is of such a degree as to be punishable; were it punishable if committed it in this province, we know that it is liable to punishment by the laws of Lower Canada, the criminal law of England being introduced there by a British statute, which we are bound to notice. I therefore concur in the discharge of the rule *nisi*.

*Et per Cur.*—The rule *nisi* was discharged with costs.(a)

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(a) Vide *Smith v. Collins*, U. C. Rep., Hil. T., 9 Vic.

## WHITEHEAD V. BROWN.

The costs of a special jury are not costs of the day.

It was settled in this cause, that the costs of a special jury are part of the general costs of a cause, and are not *costs of the day*, as the same jury would eventually try the cause; the costs of summoning the jury excepted, as that must be done again.

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## MITTLEBERGER V. BY.

A contractor or workman entering upon land to quarry stone under the Rideau Canal Act, gains no property in the stone by severing it from the freehold; when it is quarried it belongs to the crown, or if the crown do not take it, to the owner or the land; and therefore an assignment by the workman who quarried the stone is void.

This was an action of trespass; it was tried at the Johnstown District assizes before the Chief Justice. On the trial it appeared that the defendant is the chief officer superintending the Rideau Canal; that one Simpson entered into contract with him to perform certain works in the construction of that navigation, but the contracts not being produced, the precise object and nature thereof did not appear; it was understood, however, that a part at least related to the construction of three locks; that under such contract the said Simpson conceived he had a legal right to enter upon a tract of land (the owner of which was unknown) adjacent to the line of the canal, to quarry stone there for the purpose of using it in the work to be done under the contract; that it was supposed the defendant could sanction it under the Rideau Canal Act, and that although no express authority was asked of or given by him, it could if necessary have been obtained, and that it was only in virtue of a contract with government relating to the canal and the supposed sanction of the act that it was done; that Simpson sub-contracted or hired others to quarry stone on the lands alluded to (the agreements were not produced); that after a quantity had been quarried by them, the sub-contractor sold to plaintiff (on Simpson's alleged refusal to accept it of of them) such part of the stone as would meet the contract with Simpson to be paid for. The principal



consideration was said to be the heavy advances made to them by the plaintiff while working under Simpson. The sale was by a written assignment, proved in evidence.

The stone had not been marked by government, and Simpson said that before paying it was usual for government officers to approve and mark both the work and materials.

A formal or symbolical delivery was made on the ground of the stone, but it was not removed, and afterwards it was by defendant's order taken and used in the construction of the canal with a view to which it was originally quarried.

The vendee of the sub-contractors under Simpson now brings trespass against the defendant for taking the stone.

The Chief Justice recommended the plaintiff to take a nonsuit, and on his refusal, expressed to the jury a positive opinion against the plaintiff's claim; but a verdict for the plaintiff, damages 1000*l.*, was nevertheless rendered.

The *Solicitor-General*, for the defendant, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted without costs, it being contrary to law, evidence, and the judge's charge.

In this term *James Boulton* shewed cause, and the *Solicitor-General* was heard in reply, and the court gave judgment.

ROBINSON, C. J.—At the assizes I told the jury, that I had no hesitation in saying that the plaintiff could not maintain his action. If the Rideau Canal Act had never been passed, the workmen would have been mere trespassers; they had acquired no property in the stone from the circumstance of having quarried it, and therefore could convey no property to the plaintiff. It is plain on the other hand, that the act giving authority to the defendant to enter upon the land, and to take materials for the construction of the canal, and also giving the owner of the land a right to claim compensation from government for any injury happening to him, also vested such materials, when severed from the land, in the crown for the purposes of the canal, and consequently the defendant could have justified taking the stone even against the owner of the land. I thought the case a plain one at the assizes, and I have seen no reason to change my opinion. I think also, that as the plaintiff chose to proceed contrary to

the positive opinion of the court, a new trial should be granted without costs.

SHERWOOD, J.—I think the property in the stone vested in the crown. The first section of the provincial statute 8 Geo. IV. chap. 1., enacts in substance, that the officer employed by his Majesty to superintend the works on the canal, shall have authority to enter into the lands or grounds adjoining or lying contiguous to the canal, the property of individuals, and to take therefrom any materials which he may find necessary for the construction of the works or contemplated improvements of the internal navigation between Lake Ontario and the River Ottawa. The 23rd section provides, “That all and singular the powers and authorities given by this act to his Majesty, or to the officer to be employed by his Majesty in superintending the construction of the said canal, or to the officer at any time hereafter in charge thereof, shall extend, so far as may be required for the purposes of this act, to all and every the persons employed or to be employed in the execution of any matter authorised to be done by this act.” When Simpson made a contract to construct a part of the canal for government, it was understood he was to take stone from the quarry in question, and I think he acquired the same right to take materials for that purpose by virtue of such contract, as the defendant himself had ; the contractor was a person employed by the superintendent in the execution of matter authorised to be done by the act.

The powers conferred on the agents of the government, for the purpose of constructing the Rideau Canal, are certainly very great, for they may take the property of private persons without their consent, to advance the public service. Many consider this law unjust, because they assert it deprives the owner of a part of his property without any compensation. I cannot say I am of this opinion ; I think the canal, when completed, will give general satisfaction, and no public work based on such an extensive plan could ever be accomplished, without vesting the servants of the government with powers in some degree proportionate to the difficulty of its execution, and the importance of its objects. With respect to the compensation for materials

taken, I am inclined to think the owners of the land from which they are drawn are as much entitled to payment for them, as they would be if the land itself were taken for the use of the canal ; an equitable construction of the act includes satisfaction for one species of property as well as another, and if the letter of the law does not contain the enactment, justice requires this construction and the spirit of the act supports it.

I think there must be a new trial, for it appears to me the present verdict is against the intention of the statute.

MACAULAY, J.—The question is, whether under the Rideau Act the defendant was justified in appropriating the stone in question to the use of the canal under the circumstances mentioned, and if not, whether the plaintiff had such a possession or right of property therein under the bill of sale and symbolical delivery proved in evidence, as to enable him to sustain this action.

First, as a general proposition it may be stated, that any entry upon the lot upon which the stone was quarried was *prima facie* a trespass upon the owner, and that the stone, when served from the freehold tortiously, formed immediately a chattel of the owner of the soil, lying upon his close ; and any subsequent removal thereof, or any subsequent entry to remove or transfer the possession of the same, would form additional acts of trespass against both the chattels and close of such owner ; so that independent of other considerations, the quarrying of this stone, and the entry on the land to sell, and the sale thereof, all formed *prima facie* trespasses *quare clausum fregit*, and to the chattels of the owner, whoever he was, as between him and the parties who quarried, sold, and bought the stone. It would seem to follow, therefore, that the workmen being trespassers, and having no right of property in the stone, could not make a valid sale thereof, so as to divest the right and title of the owner, who notwithstanding such sale could prevent the removal, and nevertheless appropriate as his own the stone quarried upon and lying on his premises. If then in law the stone was his, any act of trespass in the officers of government in taking it would seem to be a trespass against the owner of the land, and not others posses-

sing no title but as trespassers themselves upon his possession and property. If the owner of the land might maintain trespass for the value of the stone against plaintiff or defendant at election (a), it does not seem reasonable that the latter should be twice liable, to the real owner and the tortious possessor.

If the plaintiff was in fact and law a possessor at all, inasmuch as upon his relinquishment of the contractor's possession he received from the workmen, the actual possession, if ever divested, would revest in the owner of the soil, by reason of his right of soil and right of property in the stone. (b) If B. sell to C. goods of A., A. can sue either, but only can get one satisfaction; after recovery by A. against B., B. may sue A.—3 Atkins, 49; Roscoe's Evid. 322; Saunders, 3; Barnes, 1560, 1563; 2 Bun. 1827; 2 M. & S. 499; 1 T. R. 55; 12 E. 209; 1 N. R. 25; Palmer, 327; Cro. Car. 242; 7. T. R. 11, 13; 6 G. 597; 2 Camp. N. P. C. 491-2; 9 Price, 287; 1 East. 244; 2 Saund. 476; 3 Will. 332; Cro. El. 819; 2 D. & R. 755; 1 B. & C. S. C.; 5 B. & C. 897; 2 D. & R. 1; 5 B. & A. 826, S. C.; 2 Camp. N. P. C. 355.

But whether the plaintiff could maintain trespass under the title and possession which he has proved against a mere wrong-doer, whether in such event he would be entitled to recover the full value of the stone, and whether after such recovery the owner of the soil could also recover against the same wrong-doer the value also, or be restricted to his remedy against the plaintiff alone, are not important considerations, when the operating effect of the Rideau Act in protecting and justifying the defendant are considered.—See 1 B. & A. 60.

The stone being enhanced in value by dressing, &c., would not change the property so as to render it that of the manufacturer; it would still remain the original owner's.—2 Camp. N. P. C. 576; 2 Bl. C. 404-5, & N. 41; also Year Book, 5 H. 7, 15, 12, H. 8; 10 Moor, 20; Popp. 38.

Looking at all the provisions of the act, and bearing in mind the object of the legislature, the question that first occurs is, whether the defendant could take stone from the

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(a) 2 Chitty R. 636.

(b) 1 M. & S. 711; 12 Mod, 682.



land in question, to use in the erection of the canal. It is clear by sec. 16 it could be done for repairs; and sec. 1 authorises him to take and carry away stone and any other thing that may be got in making the canal, or out of any lands or grounds of any person adjoining or lying contiguous thereto, and which might be necessary for constructing or repairing the canal. As relates to stone to be used in the canal, the enactment simply is, that the defendant might take and carry away stone which might be dug or got out of any lands or grounds of any person lying contiguous thereto, and which might be necessary for constructing the same. It seems clear, therefore, that the defendant might legally take stone out of the land in question. The remuneration of the owner is provided for in other clauses; there is some obscurity in them, but taking the whole together I should think, without expressing any positive opinion, that such is the soundest interpretation of their legal import; at any rate the defendant's right of appropriation would nevertheless subsist.

It appears then, that *prima facie* the men who quarried the stone were trespassers, and as such could not acquire and could not therefore impart any property in the stone in dispute; that it belonged to the owner of the freehold, who could sue them, or any other person who removed the same, for the value *prima facie*; therefore he could, as owner, sue the defendant in trespass, a right inconsistent with an equal right of action in plaintiff for the same identical thing, unless perhaps against another wrong-doer; so far it would be reduced to a new question, what remedy one wrong-doer could have by reason of his possession against another, admitting a possession in plaintiff, which is questionable; and the suggestion again occurs, would a recovery in full by the plaintiff against the defendant, exonerate the defendant's liability to answer again in full to the owner? Could a double recovery be had against the same party? (a)

Then how does the case appear in fact and law? the vendors were not trespassers in quarrying the stone, though they

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(a) As to this point see cases referred to in a subsequent case of *Watson v. Terwilligar*.

became such perhaps when they tortiously sold to plaintiff; they were not trespassers until then, because the stone was quarried under the authority of the act, and the sanction of government express or implied in prosecution of the work in progress. Simpson contracted with a view to the privilege of obtaining these materials, and under the authority of the act he or the vendors of the plaintiff as his servants or subcontractors entered lawfully and quarried the stone; no action would lie against them at the suit of the owner, and if prosecuted by him in trespass, Simpson and all his workmen might justify under the 23rd sec. of the act. Can it be supposed they could enjoy the protection of the statute to sever the stone from the freehold, and when reduced to a chattel, then sell it as their own? to be sure such misappropriation might render them trespassers *ab initio*, but it would evidently give no right to the vendee. Had this stone been quarried by the owner of the soil, or by the plaintiff or his vendors tortiously, with a view to some private individual object, and without any regard to the canal, I am by no means prepared to say the defendant could, after quarried and reduced to a chattel property, especially if enhanced in value by being cut or dressed, appropriate it to the canal under sanction of the act, or without the previous assent of the party hewing it; for stone taken under such circumstances could not be said to be dug or got out of any land, but to be got upon the land; and as well might any other property, as hewn or manufactured timber, waggons, &c., be seized. But in the present case the government contracted for certain work upon the canal, and the stone was dug and got out of the land contiguous, under sanction of the act for that purpose. In the eye of the law it was so dug and got by the government, or the agents of government employed by and protected under an act passed to indemnify the government officers and agents. The only business the vendors had with the article was to quarry it; they had no estate or interest in the land, no property in the stone; the stone belonged to the owner of the land, liable to the appropriation of government, and it was appropriated. The vendors could have no lien therein for payment, whatever claim they had against those they con-

tracted with. Simpson of course had a right to look to government for payment of whatever he did in fulfilment of his contract as a servant of government, and the workmen could look to him for remuneration for their services. The owner of the stone could look to government for its value, and I do not see any principle upon which the plaintiff, claiming title as vendee of the sub-contractors of the government contractors, can sue the officer of government. Had the stone been rejected by government as insufficient, (and if a rejection would give a right to the contractor, none could accrue till rejection.—3 Esp. 114—a case important also as respects the plaintiff's right of action) such rejection could not invalidate or affect the right of the owner of the land to look to government for indemnity; and if it could, in that event, but only in such event, the matter would then rest between the owner and the contractor; and if the contractor in the absence of any right of appropriation, except by the owner, sold the stone, and then government seized it, the vendee might, as against the government officer, who would be a wrong-doer, maintain trespass. But it appears to me the contractor in the event of rejection would incur no liability to the owner, who would, however, recover against the government, and would have a right to retain whatever stone government did not engross, and consequently the contractor could not legally sell. However, as the bill of sale from Simpson's men to the plaintiff, was only of such stone as would meet the contract with Simpson, who doubtless contracted for such as would meet his contract with government, the chance of a rejection would seem obviated. It appears to me the stone was quarried for government, and that until rejected by government, against which the presumption prevails, and the bill of sale, the right of appropriation subsisted; if rejected, the owner might hold it, looking to government for additional indemnity; the government contractor could not sell it. As matters stand, the owner can look to government for the work done by him, of which government have availed themselves; the sub-contractors can look to him for their remuneration; and the plaintiff can look to the vendors, if

liable under an implied warranty, for selling a property over which they had no controul; the rule of *caveat emptor* well applies, and by referring all parties to their original legal rights, I think the law is correctly administered.—Tidd. 946; 1 Chitty R. (costs) 633-4, a. 2, 268, 426; 12 Mod. 370; 1 Str. 642; 1 Burr. 12,393, 2, 665; 1 T. R. 20; Hullock, 387, several cases; 1 Bl. 670; 3 T. R. 551-2; 2 Arch. P. 260. Where the jury give a perverse verdict—when there is any perverseness in the finding of the jury—when there has been any misconduct of the jury—new trial without costs; if the verdict has been the error of the jury only, with costs.—1 Chit. R. 433; 2 Do. 268, 426; Hullock 397. Where the verdict is against law or the opinion and direction of the judge, it is the practice of both the Courts of King's Bench and Common Pleas to set such verdict aside, and grant a new trial, in the former case constantly, and in the latter generally without costs.—T. 28 Geo. III. Lib. Cow. 808; Jackson v. Durham, *ib.*; B. R. H. 30 Geo. III.; *sed vide* 1 Anstr. 47; 1 Bl. 670; 3 T. R. 557; T. R. 551. I think in the present case the verdict should be set aside without costs, being contrary to law and the Chief Justice's express directions.

*Per Cur.*—Rule absolute without costs.

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### McCARTHY v. Low.

A writ of *fi. fa.* against lands, bearing *teste* after the death of the defendant is void.

This was an action of trespass *quare clausum fregit*, tried at the Bathurst assizes, when a verdict was taken for the plaintiff, subject to a question raised on a point reserved, as to whether lands can legally be sold under a writ against a party who is dead, the writ bearing *teste* after his death. After argument by *Jas. Boulton* for the plaintiff, and *Solicitor-General* for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

As it was at the request of both parties that the point was reserved at the trial of this cause, upon which the judgment of the court is requested, I expected some attempt would be



made to shew, that lands can be legally sold under an execution against the lands of a deceased defendant, though it bore *teste* after his death; whether they can be or not is the sole question here, and as it seems to me to admit of no question that they cannot be, the plaintiff in my opinion should have the benefit of his verdict.

The cases *Earl v. Brown*, 1 Wils. 302, and *Heapy v. Parris*, 6 T. R. 369, are expressly in point to shew that this execution is void. It is against the principles of the common law, and there is no statute to help it, for though the judgment may (in some cases under the provisions of the statute law) be entered up after the death of a party, execution is never awarded after his death to seize either goods or lands of his, which can be no longer his; as Lord Kenyon observes in the case of *Heapy v. Parris*, "The moment a party is dead, the rights of his creditors are fixed;" and that right is, to pursue their remedy against the representative of the deceased debtor. In *Bragner v. Langmead*, 7 T. R. 20, they review and confirm this case of *Heapy v. Parris*, and recognize this distinction as clearly settled, that execution may issue against the goods of a deceased defendant, provided it can bear *teste* before his death, but that if it bear *teste* after his death it is clearly irregular.

If the defendant dies after the *teste* of the writ of execution the law is otherwise, for according to Chief Baron Gilbert (on Executions, p. 16), if the defendant dies after the *teste*, either before or since the statute of Frauds, the *fieri facias* may be executed on the goods in the hands of the executor, because the sheriff was entitled to seize them from the time of the writ, and therefore the death of the parties made no alteration in the title. The converse of this proposition must, on the same principle hold equally good when a party dies before the *teste* of any execution, his estate subject to the consequences of the stat. 5 Geo. II. chap 7, vests in his executors or heirs, according to its quality, not affected by any right the sheriff can in such case have to seize or sell; and it is quite impossible it can be sold under an execution subsequently taken out against the deceased defendant, and appearing to have been subsequently taken

out by the *teste* of the writ itself ; such a writ must be absolutely void, and no legal sale can take place under it.

This very point has been determined by this court, with respect to an execution against the lands in the case of *Vary v. Muirhead*.

*Per Cur.*—Judgment for the plaintiff.

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### THOMPSON V. MARSH AND DRAPER.

Rent reserved at a certain sum, payable in produce at the market price, is sufficiently certain to warrant a distress and sale. Trespass lies for a seizure and sale of goods where they have been left on the premises, after a distress, longer than five days, no person being in charge of them, the seizure and sale for which the action is brought being subsequent to the five days after the first seizure ; but in such case the full value of the goods cannot be recovered, but only special damages.

A rule was granted to shew cause why the verdict should not be set aside, under the following circumstances :

The plaintiff had rented the north half of No 14, in the 2nd concession of Hope, from one Stoner, whose agents the defendants were, for 25*l.* for one year's rent ; the lease was dated 29th February, 1828, for eight years (in consideration of 75) from April, 1828. at 25*l.* per annum rent, payable on or before the 1st day of February in each year, at Port Hope, in produce at the market price, provided, that certain repairs were to be made by the said plaintiff in the premises, to be allowed out of the four years' rent ; the repairs were proved to be equal to about 5*l.*, so that 22*l.* remained due.

The goods were seized 21st December, 1829, and consisted of oxen, cows, a fanning mill, and hay, valued at from 28*l.* to 53*l.*, sold for 28*l.*, and 6*l.* was returned to the plaintiff.

The goods were not removed from the premises, and there was no person left in actual custody of the goods, but they were left, it is said, in charge of one Kinder, who lived on the adjoining lot ; the goods were not removed. The sale was first appointed to be on 28th December, 1829 ; but as was said, from want of bidders, it was afterwards postponed till 15th January, 1830, on which day the articles were appraised and sold on the premises. No proof of notice of sale was offered, or of delivery of notice of distress or inventory to the plaintiff, until the day of sale, when an inventory and appraisal were

delivered to him. Macaulay, J., who tried the cause, charged the jury to find for the plaintiff the value of the goods, subject to the points now urged in the present motion ; the verdict was for 45*l.* 2*s.* 6*d.*

First point, whether for a rent certain reserved payable in produce at the market price, a distress can be made in default of satisfaction thereof.

Secondly, if so, whether by reason of the entry into the plaintiff's premises, and sale of his goods at so long a period after the expiration of five days, in the absence of due notice, and a bailiff in charge, &c., an action of trespass lies.

Thirdly, if so, whether in such action the defendants are to be regarded as trespassers *ab initio*, or at least to the full extent of the injury committed on the last occasion ; and if so, whether under the statute 11 Geo. II. chap. 49, it should have been left to the jury to say what special damages plaintiff sustained, or whether plaintiff is entitled to recover the full value of the goods at least.

*Sullivan* shewed cause.

Although the books are full of authorities to shew the rent may be, and was in ancient times, commonly reserved in other things than money ; and although a tenant, when rent was so reserved, might have been, and is, subject to distress, yet the quantity of the article in which the rent is to be paid must be certain (*a*). The quantity here depends upon the market price, which may not easily be ascertained, and concerning which there may be a variety of opinions ; but even allowing that a distress might be made for this rent, yet the statute allowing a sale of the distress cannot apply, as the amount in money is not ascertained. Suppose for instance the rent reserved to be a horse, or a rose at Christmas, or service, for all which there may be a distress, how can there be a sale, and for what sum ? So long as the law only authorises the detaining the goods until satisfaction of the rent, there was no necessity for ascertaining its exact value, because the distress forced the payment of the rent in the manner and specie in which it was reserved ; here the case is different, as the

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(a) 5 Co. 79 ; Co. Lit. 96 a. & 142.

allowing a sale by the plaintiff is making him judge of his own cause of the amount of unliquidated damages for the non-performance of a contract.

As to the question whether the action of trespass lies: if this were merely for an excessive distress, or a mere irregularity, which before the statute 11 Geo. II. chap. 49, s. 19, might have made the party a trespasser *ab initio*, there might be some weight in the objection made on the part of the defendant, but in this suit the plaintiff is not obliged to shew the defendants trespassers *ab initio*; he sues for an actual trespass in entering, and again seizing the goods after their abandonment on the first seizure, which is an act of trespass in itself, which no right of distress which the defendant might originally have had will justify. (a) The judgment of Lord Ellenborough is precisely in point, as the act complained of is the same, namely, the taking and removing the goods from the premises, and the disturbance of the plaintiff's possession therein, after the time when by law they ought to have been removed, with this addition, that in this case the possession of the goods was a fraud by the defendants, and the entry and seizure new and unauthorised under which the goods were sold.

As to the alleged misdirection in the judge, in directing a verdict for the plaintiff for the full value of the goods, it seems to me to have been the correct view of the question; the second entry and seizure in this case having been after the abandonment of the goods taken at the first, and as I would contend, wholly independent of it. The trespass must be viewed as committed without any authority, and as if there had been no distress warrant or seizure on account of rent, in which case it cannot be contended for a moment that the defendant would be entitled to set off any rent due against the damages; if the jury had taken the rent due into account, then the verdict would not have been a bar to a new distress on an action for the rent.

*Boswell*, contra.—The rent is certain in this case, being for a certain amount; and though payable in produce, yet

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(a) 1 E. 139; 7 T. R. 654; 1 H. B. 13; 2 Star 851; 11 E. 395.



it is a certain sum, which, if not paid in produce, can legally be recovered in money. The value is ascertained in the reservation of the rent at 25*l*. The statute providing for the sale of distresses taken, makes no such distinction as is set up by the plaintiff's counsel; as to the sale, distresses may be sold for all rents justly due, and whether the amount be justly due or not, may be tried by a replevin, or an action on the case for a distress for more rent than is due. The distress in this case was legally made for rent justly due, and the defendants' not remaining in possession was merely an accommodation to the plaintiff; the defendants did not distress him on the premises, but for his benefit delayed, however irregularly, the final disposal of the distress according to the statute; this cannot make the defendants trespassers *ab initio*. (a)

As to the third point, the distress was clearly legal, and for rent justly due; the stat. 11 Geo. II., chap. 49. is clear in its application to this case, that no irregularity or unlawful act which should be afterwards done by the party distraining should make the distress illegal, but that the party aggrieved should recover the special damages he may have sustained; now here the jury were not directed to make any allowance on account of the amount of the rent paid by this distress and sale, from which rent the effect of the verdict under the statute would be to discharge the plaintiff altogether. The sale is not invalidated by the irregularity, and all proceedings stand good and effectual, notwithstanding the plaintiff's claim to damages. (b)

ROBINSON, C. J.—I am of opinion that in this case trespass was rightly brought, but that the damages to be given were the special damages sustained, as the defendant's counsel argued, and not the value of the goods.

The case cited of *Winterbourn v. Morgan*, 11 East. 395, is decisive as to the form of action, viz., that trespass may be maintained for the injury complained of here; and Mr. Justice Bailey expresses his opinion clearly, that the continuing in possession of the goods after the five days, though it sub-

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(a) 1 H. B. 13; 2 Stra. 851.

(b) 3 B. P. C. 470; 3 Bing. 334.

jects the parties to an action of trespass, does not divest the property in the goods acquired under the distress, nor render their subsequent removal illegal. This applies to the question of damages, because if the distress and sale are upheld, the plaintiff has been paid his rent, and he has no claim to any damages except such as he has sustained by the very act of trespass complained of. Indeed, the words of the 19th sec. of 11 Geo. II., ch. 19, admit of no other opinion, for they declare that for any unlawful act or irregularity done by the party distraining, and after the distress, the distress shall not be deemed to be unlawful. I find no reason to doubt that a distress may be made for rent reserved as in this case, that is, a certain annual rent payable in stock at the market price. It seems to be sufficiently certain, that by the common law it may be distrained for, and the statute of William makes no distinction, but allows all distresses for rent to be sold.

SHERWOOD, J.—It was doubted, at the trial of this cause, whether a landlord can distrain for rent agreed to be paid in wheat and pork, although the amount was liquidated and made certain by the lease.

I think the landlord under such circumstances might have distrained even at common law, as appears by Co. Lit. 91 *b.*, and 142 *a.* The stat. 4 George II. chap. 28, goes further than the common law, and permits a distress to be made for rents such as rents of assize and chief rents. I therefore conclude it may now be considered a universal principle, that a distress may be made for any kind of rent in arrear, which is either certain or can be made certain.

There is no doubt that the rent in question was justly due, and it is equally clear the illegal conduct of the defendants would have made them trespassers *ab initio* by the common law, and rendered them liable to the payment of damages equal to the value of the goods. The stat. 4 Geo. II., chap. 19, however, made a material change in the law in this respect, the 19th sec. enacting, "That the party or parties "aggrieved by such unlawful act or irregularity shall and "may recover full satisfaction for the special damage he, "she, or they shall have sustained thereby, and no more, "in any action of trespass or on the case," &c.

This part of the act did not happen to be adverted to at the trial, or supposed not to embrace the action of trespass, in consequence of which the jury gave the full value of the goods distrained without deducting any part of the rent due. Under such circumstances a new trial should of course be granted, and in my opinion it should be without costs.

MACAULAY, J.—It appears that the rent must be certain in its quantity, extent, and time of payment, or at least be capable of being reduced to such certainty—Co. Lit. 96, a. 142; Bradley on Distresses, 26; Gilbert on Distresses, 6, 28; Year Book, 38, H. 638; Cruise's Digest, 280, 299; 4 Mod. 78; 5 Co. 79; Gray's Inn, 31.

It would appear from these authorities, that a landlord may distrain for rent reserved in other articles than money.

The only question is, then, whether he can sell the distress therefor. (a) The 2nd W. & M. sec. 1, chap. 5, for enabling the sale of goods distrained for rent, in case the rent be not paid within a reasonable time, provides that when any goods, &c., shall be distrained for any rent reserved, and due upon any demise, lease, or contract whatever, and the tenant or owner shall not replevy them within five days after such distress taken, and notice, &c., the landlord observing the formalities prescribed, may lawfully sell the goods, &c., towards satisfaction of the rent for which they should be distrained.

The statute comprehends all rents for which a distress may be taken, and I do not see any sufficient reason why a sale could not legally have taken place in the present instance.

The second point: the following cases sufficiently shew that trespass does lie under the circumstances of this case.—2 Ld. Ray. 1424; Strang. 717; 4 B. & A. 208; 1 East, 139; 11 East. 395; 2 Chit. Plead. 744, (a); 2 Car. N. P. C. 115; 2 Bl. 1218; 5 Taunt. 198; 1 B. & C. 145; 2 D. & R. 256.

Third point: the 11 Geo. II. chap. 49, s. 19, enacts that when any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, the distress shall not be deemed unlawful, nor the party making it a trespasser *ab initio*; but

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(a) 3 Bing. 334.

the party aggrieved by such unlawful act or irregularity, shall and may receive full satisfaction for the special damage he shall have sustained thereby, and no more, in any action of trespass or on the case, &c. However the want of having a person in custody of the goods might have entitled an execution to have superseded the distress in favour of a judgment (a) or however irregularly the distress was conducted from beginning to end, it is plain the defendants all along acted with a view to a sale under a regular distress warrant. Had a person been left in charge, or the goods been duly impounded on the place, regular notice given, &c., it is clear that a sale at a period later than the expiration of five days, would not be actionable at all, unless deferred for an unmeasurable time, and that after an unreasonable delay the ultimate sale would be a tort in the conduct of the distress, and though actionable and in law a trespass, yet the parties culpable would not become trespassers *ab initio*, but the tenant's remedy would be for the special damage under the statute.

The illegality of the sale does not invalidate it as respects the rights of purchasers (b), or the satisfaction of the rent. For any special damage redress is afforded under the statute, but nothing more.

In the present case the distress in the first instance was not illegal, and although properly speaking the bailiff should have duly impounded the goods and kept constant possession of them, yet as the levy was made, and an imperfect kind of charge given to the next neighbour, more especially as there was no actual intention of abandoning the distress—as they were left on the premises as attached to await the time allowed the tenant in law to replevy (c)—as no conflicting claim intervened—and as the same was not removed from the lot, but forthcoming at the time of sale, it seems to me admitting the illegality of the sale owing to the irregularities committed in conducting the distress, that nevertheless the defendants were acting avowedly under and within the protection of the act, as respects their liability, and the rights

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(a) Creditor, Willis, 55-6; 1 M. & S. 711; 8 Price, 95.

(b) 3 Bing., 334; 3 B. & A. 470.

(c) Willis, 55-6; 8 B. & C. 456; 5 Biog. 10, 499 qu.



and interests of the landlord, the tenant and purchasers; and that therefore it should have been left to the jury, not to give the value of the goods as damages, but merely the special damage sustained by the tenant by reason of those irregularities or tortious acts of the defendants, which in law amounted to and sustain the action for trespass. The verdict should therefore be set aside without costs.

*Et per Cur.*—Rule absolute without costs.

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### BOULTON V. RUTTAN.

A stranger may pay taxes on land without the consent of the owner at the time, and a redemption by a stranger, before the year is out after the sale, is sufficient to prevent the forfeiture, though done without the knowledge of the owner.

The time of redemption excludes the day on which the sale takes place, and the expression "from the time" may be held as either inclusive or exclusive of the day, according to the context in the statute, and the bearing and object of its provisions.

If the treasurer certify a redemption improperly, he is liable, and not the sheriff refusing to make a conveyance.

This case was tried at the Newcastle assizes; the facts of the case were as follows: Lot No. 12, 3rd concession Hamilton, was included by the clerk of the peace of the Newcastle District, pursuant to provincial act 6 Geo. IV., chap. 7, as liable to sale for arrears of assessments. The lot was accordingly sold to plaintiff on the 1st day of March, 1830, and on the same day of the same month in 1831, the redemption money was paid by a stranger on behalf of, but without the knowledge, request, privity, or assent of the owner. Within the year an arrangement had been entered into, and afterwards cancelled, between the treasurer of the district and another person, who at one time desired to redeem on behalf of the owner, not the one who afterwards actually did so, under which arrangement, though the money was not paid, the Treasurer gave a receipt for the amount, assuming himself the responsibility to the public; this receipt was afterwards destroyed and given up.

The treasurer kept a book in which all the lands sold were inserted, and the fact of redemption placed opposite each lot as relieved. This book was kept at the sheriff's office by the sheriff or his deputy, both being authorized agents of the

treasurer. The redemption money was paid to the deputy-sheriff as the agent of the treasurer, who adopted and approved all his acts in the latter capacity, and received the amount of the present redemption from him. No dates appear to shew the period of redemption, so that on the face of the book the land appeared simply redeemed by the individual who paid the amount. About the time of the redemption the plaintiff asked the treasurer if it had been redeemed and, being so informed applied for the amount coming to him, which though not paid, the parties being out of the district, was postponed on terms satisfactory to the plaintiff.

The action is brought by the plaintiff against the defendant, for refusing to execute a deed that was duly tendered to him after 1st March, 1831.

The value of the lot is from 100*l.* to 150*l.*; the amount of the purchase money under 10*l.*

A verdict was rendered for the plaintiff, subject to the following points :

First was the redemption money paid in time ?

Second, if so, was it competent to the party who paid it to redeem the lot by a spontaneous act of his own, unauthorised and unsolicited by any one as owner ?

Third, is the sheriff exonerated by the certificate entered in the treasurer's book ?

*Draper*, for the plaintiff.—The facts relied on by the defendant are, first, the treasurer gave a receipt before the time for redemption was expired, but this receipt was returned and cancelled ; then a tender was made to the treasurer of the district, out of his district, two days before the time for redemption expired, who declined receiving it, as he had not time to advise the sheriff of the payment, and the deed might be made in the meantime to the purchaser. The sale was on the 1st March, and a payment was made by a mere stranger on the 1st March following, when it was too late, and the time of redemption expired. The entry of the payment made by the deputy sheriff (who it is said was the treasurer's agent to receive the money) was without a date, and the defendant alleges he had no notice of the payment, and sold the land in the common course of his duty. In the first place

the treasurer has no right to give a receipt without receiving the money, and if public officers were allowed to enter into arrangements of any nature, other than the simple discharge of the duties imposed upon them by law, numerous evils must be the result; the person making this arrangement, considered as the agent for the owner of the land; knew he had no legal right to the receipt, and therefore it must be considered void in his hands, he being no stranger to the want of the circumstances needful to give it validity that is to say, the payment of the money; the receipt was merely void, and if not so, surely those who have a right to make an arrangement have a right to unmake it. The owner of the land cannot complain because another person does not pay his taxes. As to the tender said to have been made to the treasurer out of the district, he did as he ought, he refused it. The treasurer has an office, at which place he is compellable to receive money; suppose it were on the common highway, a tender of a larger sum were made to him, is he to take what perhaps would be a ruinous responsibility upon himself, that of conveying the money to a place of safety? and above all, is the sheriff liable to an action because he does not take notice of what is passing perhaps a hundred miles off, and which he may have no possibility of knowing.

The payment made on the 1st of March, was not in time; the words of the statute are not "from the day of" the sale, but from the time of the sale, and which the court will see includes the day on which the sale was made, and consequently excludes the first day of March, the year being complete on the night of the 30th April. The case of *Cooke v. Sholl*, 5 T. R. 255; see also 1 Hob. 139; Salk. 625, shews that the court takes notice of the fraction of a day, and it is not shewn at what time of the day the sale took place. The party suing the sheriff for damages not only should have shewn this, but he should shew that the sheriff had notice of the payment, which the plaintiff ought himself to have given him. The payment was not legal, as the treasurer cannot appoint an agent or deputy to receive public money.

*Bidwell*, in reply.—As to the first fact relied on, the treasurer, though he did not receive the money, entered into an

agreement and gave a receipt as if the money were paid. It cannot be argued, if the treasurer mix up his own affairs with those of the public, and take any other satisfaction than money for a tax receivable by him, in a case like the present, where there is no imputation of fraud on the part of the person making such arrangement with the treasurer, which might be held to invalidate the transaction, that in such case the payment is invalid, and a forfeiture of the land should take place, because the money is not actually paid. The receipt makes the treasurer accountable for the money, which is all that a payment can do, and whether there be or not an actual payment cannot be held to continue a matter to be proved by evidence extrinsic of the receipt. If then such receipt be given by the treasurer under no mistake or misapprehension, can it be held for a moment that he is at liberty to cancel it? it may as well be argued that he can pay money back which he has actually received, and that for the purpose of inducing a forfeiture. When the receipt was given, the land was *ipso facto* redeemed, and no act of any of the parties, not even the owner of the land, could cause it to be forfeited. There is nothing in the act to shew that the money, when afterwards tendered to the treasurer, should not have been received; and as to the state of the actual payment not having been entered, I cannot conceive how the fault of the public officer in not making the entry properly, can possibly affect the rights of the owner of the land, who had nothing to do with the entry, or power to control the manner of making it. The sheriff is bound to take notice of matters of public record, such as the treasurer's books, and to make inquiry as to any doubt which may arise on the entries; at the time of his making the deed, it is evident, the entry was in the book, which ought to have shown him, whether there was a date or not, that the money had been previously paid. As to the ultimate payment not being made in time, there are numerous authorities to shew, that the year is not expired which was allowed for the redemption of the land until the expiration of the day on which it was paid. The words of the act are "that if at the expiration of twelve calendar months from the time of such sale," &c., &c. The true construction of the



words "*from the time*," excludes the day which the time counts from, and includes the whole of the space of twelve calendar months thereafter; this will appear from the following cases—3 T. R. 623; 5 T. R. 255, 283; Hob. 139; Cowp. 714. As to the argument urged, that the person who paid the money was a mere stranger, and had no right to pay the taxes of another, the defendant gives a strange construction to the law, the true spirit of which is to avoid forfeiture; so that the king receives his taxes, how can it matter to the public by whom they are paid. If a stranger pay A. the debt of B., can it be said that B. can recover it again from A., or that B.'s bond is forfeited because he did not authorize the payment? The argument made use of, that the treasurer could not appoint an agent or deputy, if it could be sustained, shews clearly either that the treasurer ought never to leave his district, or that he should receive the money wherever he might happen to be, so that the tender would and ought in itself to be considered a sufficient redemption of the land.

ROBINSON, C. J.—I am not of the opinion that a verdict should be entered for the plaintiff upon the matters stated in the judge's notes, and submitted to the judgment of this court. The land, I think, was redeemed in time by Clark, and his right to redeem could not be questioned by the treasurer, and still less by the sheriff; nor do I think it can come into discussion now.

MACAULAY, J.—The provincial statute 6 Geo. IV. chap. 7, enacts, that if within twelve calendar months from the time of sale, the proprietor of the lot, or any one on his behalf, shall pay to the treasurer of the district the amount levied by sale, &c., then he shall be entitled to receive possession, &c. Sec. 18: If at the expiration of twelve calendar months from the time of such sale, the land shall not be redeemed, then the sheriff shall on demand by the purchaser execute a conveyance, &c.

Hob. 139.—A suit against the Hundred under the Statute of Hue and Cry, must be brought within a year inclusive; as for a robbery on the 9th October a suit cannot be brought 9th October following. 2 Mod. 281; 1 Sal. 44.—That from the day of the date excludes it, and from the date includes it.—Sal. 625.

A lease to commence at the date includes the date, "*a die datus*" excludes it.—Cro. Jac. 250; 3 Buls. 204; Co. Lit. 466; Doug. 464; 3 T. R. 623.

The provincial act 43 Geo. 3, chap. 1, respecting the sale of lands in execution, provides, that process shall not issue against lands until the return of the process against the goods, and that the writ against lands shall not be returnable in less than twelve months from the date thereof, nor shall the sheriff sell within less time than twelve months from the day on which the writ shall be delivered to him. Now "*until*" includes the day of the return; from the teste (the act done) includes that day; and from the day of delivery excludes the latter.

Com. 714.—"From the day of the date" held inclusive; in a lease, "*from*" may mean either inclusive or exclusive, according to the context and subject matter.—Doug. 464; 2 Cam. N. P. C. 296; 2 B. & A. 586; 3 T. R. 623; 3 East. 467; 4 More. 465.

That a distress for rent may be sold on the sixth day, as a distress on Saturday may be sold on Thursday afternoon.—1 H. B. 13, 14. The statute 2nd W. & M. sec. 1 chap. 5 allows a redemption within five days next after such distress, and after the expiration of the said five days, landlord may sell, &c. Cam. 391.—The time is to be reckoned from the act done and not from the time thereof.

See Com. Dig. 464; 3 T. R. 623, and 3 East.; 1 Ld. Ray, 281, 407, determines that when time is to be reckoned *from* an act done, the day on which it is done is inclusive. But Cam. 714: 2 Car. N. P. C. 296; 2 B. & A. 596, shew that in reckoning from the time of an act done, a different construction may hold or not according to circumstances. Both classes of cases proceed on the ground that there is no fraction of a day without necessity, so that had the time of redemption been limited to run from the sale, the act done, and not from the time of the sale, the day on which the sale took place would be inclusive, but as it is from the time of the act done, the time is the day, and is exclusive or inclusive as best accords with the matter and object of the provision. I am of opinion the time may be reckoned exclusive of the day of sale.

Second point; The proprietor of the lot or any one on his behalf may redeem. There may be conflicting claims to the land and a treasurer could not decide. The party redeeming acquires no interest, he places the title *in statu quo*, and as any one may do it on behalf of the owner, the owner's assent seems not necessary to precede the act.

It is a general rule, that acts beneficial for a stranger, gratuitously done by a self-elected agent without the privity or direction of the principal, may be rejected or affirmed at his election, and here has been no disaffirmance of the party's act, who paid the redemption money.—Paley's Principal and Agent, 249; East. 274; 2 M. & S. 485.

The cases of delivering of deeds in the absence of the party are also in point, as 2 Dy. 167; 1 Sal. 301; 5 B. & C. 671, where all the leading cases are collected.

I am of opinion that the redemption by the individual who paid the money on behalf of the owner is sufficient.

Third point: Independent of the other points, the circumstance that in the record of the treasurer, kept as a guide to the sheriff in making deeds for default of redemption, the lot is represented to have been redeemed: the date is not inserted, and the sheriff need not refer to it till requested to convey. If the redemption has been improperly certified by the treasurer, he is responsible and not the sheriff.

In the absence of collusion, I think his report justified the refusal of the sheriff to convey. It does not follow that because the deed would be nugatory, if in fact a redemption had taken place that therefore the sheriff ought to convey in order to enable the parties to contest the point in an ejectment; he might, by conveying in the face of a declared redemption by the treasurer, incur a responsibility to both his vendee and the owner of the land. It is only his duty to convey when there has been no redemption, and as the money is to be paid to the treasurer, he is the person to inform him whether the land remains forfeited or relieved.

(a) I think the verdict should stand.

*Et per Cur.*—Rule *nisi* for a new trial discharged.

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(a) 15 Ves. 248; 4 M. & R. 130; 9 B. & C. 134, 603; 3 Y. & J. 1, 16; 1 M. & R. 300, n. (b)

## FORRESTER V. GRAHAM.

A declaration filed before a return of the writ, and the affidavit of service filed, is a nullity, as well as a declaration filed more than a year after process is returnable.

This was a motion to set aside proceedings for irregularity, the state of which was as follows:—

The process issued 14th of June, returnable last of Trinity Term; a declaration and demand of plea and common bail was filed by the plaintiff, this was before the writ was returned or filed, 29th of July, 1830; an affidavit of John H. Powell of service of declaration and demand of plea was made and filed, as also were writ and affidavit, the 4th of June, 1831; a second affidavit of John H. Powell, of service of declaration and demand of plea; common bail was filed by plaintiff, 29th of June, 1831, entitled of Trinity Term, 1 & 2 Wm. IV.

Interlocutory judgment was filed 10th of August, 1831, in the old form, that is to say, without an incipitur.

No rule for further time to declare was taken out. No notice of abandonment of first proceedings served. The declaration filed irregularly was re-filed, and original indorsement obliterated; afterwards a second declaration was filed, and no notice given of abandoning former declaration.

*Sullivan* obtained a rule nisi, to set aside the proceedings for irregularity on the following grounds: .

1st. On the affidavits of service of John H. Powell, the name not being in full.

2nd. On the common bail being entitled of Trinity Term last, instead of the term in which the writ was returnable, and also because filed after the first four days of the following term.—Archbold Practice, 335, 345; 6 E. 314; 2 T. R. 719.

3rd. On the interlocutory judgment, as to the want of an incipitur.—2 Ar. Prac. 29.

4th. The first declaration and common bail, being filed before the return of writ, are mere nullities; the second declaration and common bail, being filed after the lapse of more than a year, are also void.



After argument by the *Solicitor-General* for the plaintiff, and *Sullivan* for the defendant, the court gave judgment.

ROBINSON, C. J.—The plaintiff's proceedings in this case have been exceedingly irregular; without entering into further particulars, it is sufficient to say, that the common appearance or rather common bail for defendant, under the statute upon which the plaintiff intended to proceed (the one first filed being clearly a nullity, the writ not having been returned or affidavit of service filed), was not entered by plaintiff until more than a year after the process issued, and after the lapse of more than three terms after the return of the writ. Upon this ground, and upon the authority of the case cited, *Smith v. Painter*, 2 T. R. 719, the rule must be made absolute.

MACAULAY, J.—Independent of all other objections, the first common bail was irregularly filed; and if not, the second was a waiver of it, and the second was itself irregular.—2 T. R. 719, that common bail must be filed in the term following that in which the writ is returnable. 10 B. & C. 457, expressly in point; 6 East. 314; Hard. 138. The proceedings are therefore irregular and must be set aside.

*Et per Cur.*—Rule absolute with costs.

#### RUGGLES, ADMINISTRATRIX, v. BEIKIE.

A replication in an action of assumpsit, to a plea of the Statute of Limitations, setting out that the defendant was sheriff, and that the amount was a surplus remaining in his hands of money levied under a *fi. fa.* held bad, although the plaintiff might have avoided the statute by declaring in case, setting out the circumstances specially.

The plaintiff declared in assumpsit, on promises to the plaintiff as administratrix, on the common counts: first money had and received; second, money lent and advanced; third, interest; fourth, account stated.

The defendant pleaded first, the general issue; secondly, *actio non accrevit infra sex annos*. The plaintiff took issue on the first plea, and replied to the second, setting out that at the time the action accrued the defendant was sheriff of the Home District; that a writ of *fieri facias* against the lands and tenements which were of James Ruggles, deceased, at

the time of his death in the hands of the said administratrix to be administered, issued to the defendant, commanding him that as sheriff he should cause to be made 103*l.* 4*s.* 9*d.*, which John Gray lately, &c., recovered, &c.; that the said writ was endorsed to levy 22*l.* 9*s.* 1*d.*: that under and by virtue of the said writ the said sheriff did seize and sell certain lands for 170*l.*, as and for the purchase money, which money he received, and wrongfully retained the balance over and above the sum for which the writ was so indorsed.

The defendant demurred to this replication generally.

*Attorney-General* for the plaintiff.—The remedy in this case is mistaken, as to the person entitled to bring the action; the property is stated in the replication to be the lands and tenements of the deceased Ruggles, and consequently did not belong to the administratrix, or fall under her control; without raising the question as to the power of the sheriff to sell lands under a writ against the administratrix, it seems plain that lands being seized for a debt in her hands, could give her no interest in the proceeds further than they might be necessary to satisfy the judgment in question. The nature of the remedy is also mistaken. If the sheriff has sold the whole property to satisfy so small a sum as is endorsed upon this writ, instead of selling a part merely sufficient for the purpose, the action ought to be case for his breach of duty; as to the Statute of Limitations being a defence in this action, there can be no doubt, as there is no instance in which it is not a good defence pleaded to a declaration assumpsit. The plaintiff in this case has chosen her remedy; she cannot depart from it, and after declaring in assumpsit, avoid the statute by replying in case, which she has attempted to do (a). The plaintiff should also have set out the judgment, to show on what the proceeding stated in the replication was founded, otherwise there appears no pretence for selling lands which must have belonged to the heir.

*Small contra.*—As to the general question, whether the writ against the lands and tenements is warranted by law:

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(a) 2 Mod. 212; 1 Saund. 372; Cath. 443; Sto. 509; 1 Saund. 37.

arguments have taken place on other occasions concerning the subject already, sufficient to set the matter at rest so far as it can be decided without an appeal. It would be extremely hard if the contradictory decisions of the courts on this point, making it impossible to tell who was entitled to receive the money, and causing delay in its recovery, should have the effect of destroying the plaintiff's claim, and of entitling the sheriff to money which it is acknowledged he has received and never paid over. This appears in the replication, and there is nothing inconsistent with the declaration in such statement; it merely details circumstances which ought to prevent the statute from applying. As to the remedy being mistaken, it is a well established principle, that a tort may be waived and a plaintiff bring *assumpsit* or case at his election, where money has been tortiously received and detained; the defendant is not allowed in such case to take advantage of his own wrong.

As to the pleading the judgment, the sheriff cannot allege there was none, as he acted under the writ and received the money, and if there was no judgment he must have received it wrongfully, which he cannot be admitted to allege. In actions of debt for money levied by the sheriff, the statute has been held to be no plea, in the following cases:—*Mod.* 245; 2 *Show.* 79; 2 *Saund.* 67; 2 *Mod.* 212; 1 *Leo.* 191, is debt for an escape; *S. C.* 1 *Sid.* 305; and there is no good reason why the same principle should not extend to an action of *assumpsit*.

ROBINSON, C. J.—The replication is clearly bad as to the 2nd, 3rd, 4th and 5th counts, which can have no relation to the matter pleaded. A replication bad in part, is bad for the whole; *vide* *Trueman v. Hurst*, precisely in point as to this 1 *T. R.* 40, and *Webber v. Tivill*, 2 *Saunders*, 124.

I think it doubtful whether the judgment should be averred or not, but believe it should, as in escapes.

MACAULAY, J.—The following cases establish, that to general *indebitatus assumpsit* the statute of limitations may be pleaded, however in debt or special actions on the case against a sheriff for monies levied by him under a *fi. fa.*, a different construction may obtain.—*Jones v. Pope*, 1 *Saund.* 37; *S. C.* 1 *Sid.* 305; 6 *Ib.* 91; 2 *Keb.* 93; 1 *Leo.* 191; 2

Sau. 72, notes; 2 Saund. 64, award; 2 Mod. 212; Ballantyne on Lims. 83, 88, 91, 96; Ib. 72. And the following authorities shew, that even if the special matter of the replication would in despite the Statute of Limitations sustain the action for money had and received, yet being replied generally to the whole declaration, and being clearly insufficient as to the other parts thereof, the replication is bad on general demurrer.—1 T. R. 40; 2 Saund. 124; Webber v. Tivill, 1 Leo 287; S. C. Willis, 27; Hardw. 41; so that either way judgment must be for the defendant.

*Et per Cur.*—Judgment for the defendant.

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#### BANK OF UPPER CANADA v. SPAFFORD.

*Stewart* moved for an attachment against the defendant under the statute 2 Will. IV., cap. 5.

It appeared by the affidavits, that the debtor resided at Brockville, and the persons making the affidavits, in York.

ROBINSON, C. J.—It will be well to lay it down as a rule in these cases, that the persons deposing as to the absconding of the debtor, should state the grounds of their belief, where they reside at a considerable distance from the defendant.

*Per Cur.*—Application refused.

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#### BAKER V. BOOTH.

When it is awarded that premises shall be delivered up by one party to the other, who is to pay money on the same day, the acts are concurrent; and it is sufficient in an action on the award for the money, to state a readiness to deliver up the premises, and actual delivery is not necessary, *et vice versa*.

To a plea stating a demand of the award on 10th of February of one of the arbitrators, it is a good replication to say, that on 6th February, (the day limited by the submission) the award was published to the parties, and ready to be delivered.

A judgment recovered for a defect in pleading, and not on the merits, is no bar to another action.

This is an action of debt on an arbitration bond; oyer is prayed, and the bond and condition are set out, to abide the award of three arbitrators named, as to all matters, &c., in the usual terms, so as the award be made in writing under



the hands and seals of the arbitrators, or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the 10th day of February next, (1828.)

Defendant pleads first, *non est factum*.

Secondly, no award made, &c.

Thirdly, that an award was made, whereby it was ordered that the defendant should pay to the plaintiff, on or before 5th January, 1829, £149, and that the plaintiff should, on or before the said 5th January, quietly and peaceably yield up to the defendant, the dwelling house, shed, and appurtenances, then occupied by the plaintiff as a tavern, in as good repair as it then was; and that the plaintiff should have liberty to secure and harvest the crop he had sown on the defendant's farm, subject to the agreement heretofore made between them, in regard to harvesting and dividing the same, but to have no further concern with the said farm, from the date of the award; that all controversies, actions, &c., should cease; that each should bear an equal share of the expense of the arbitration, except that each should pay his own witnesses; and lastly, that they should execute mutual releases.

That the defendant on 5th January, 1829, requested the plaintiff quietly and peaceably to deliver up to him the said dwelling house, &c., as in the award mentioned, and to perform the said award in all things on his part to be performed; that the defendant was ready and willing to perform, and would have performed the award in all things on his part, if the plaintiff would have performed, &c., but that the plaintiff then and there wholly refused to deliver up the dwelling house, or to perform the other parts of the award; wherefore he prays judgment.

Fourthly, sets out award by reference to the said plea, relying only on that part respecting the delivering up the premises, &c., that the defendant required the plaintiff on 5th of January, at Ernestown, to deliver up the premises &c., but that the plaintiff refused and neglected to deliver them up in as good repair as at the time of making the award.

Fifthly, that although award was made in February, 1828

yet the said award was not ready to be delivered to the said parties on or before the 10th day of February, in the condition mentioned.

Sixthly, that arbitrators on the 5th. Feb. made their award, setting it out ; but that afterwards, viz., on 10th February, the defendant requested Orren Ranney, one of the arbitrators, to deliver the award to him according to the condition, but that the said Orren Ranney did not, nor did either of the said arbitrators, then and there, or at any time before 10th February, deliver the said award to him, contrary to the condition of the said writing obligatory.

Seventhly, that arbitrators made award on 5th February, and that on 10th February, defendant requested the arbitrators to deliver the award to him, according to the condition, but that they did not, nor did either of them deliver the award to him the defendant, contrary to the condition, &c.

Eighthly, that before the submission, plaintiff committed a trespass on defendant's lands, and other wrongs stated in the plea, and these were in controversy and subsisting causes of action at the time of submission, &c. ; that the arbitrators had notice thereof, but omitted to arbitrate thereon, &c.

Ninthly, sets out the award again; that the dwelling-house, &c., mentioned in the award, are upon the farm of defendant mentioned therein, and are part, &c., thereof; that the defendant on the 5th of February next after the making of the bond, &c., requested the plaintiff to have no further concern with the farm, &c., except to secure and harvest the crops, &c., (as in the award,) but that the plaintiff neglected and refused to have no further concern with the farm from the date of award, 5th February, and thereby deprived defendant of the use and profit thereof.

Tenthly, That arbitrators on 15th February made award and ordered that each should execute to the other releases from all claims, &c., to the date of the award ; that after the submission and before the award, viz. ; 3rd February, defendant had a claim upon plaintiff for use and occupation of a house, &c., of which the said award operated as a release, contrary to the writing obligatory and the condition.

Eleventhly, That plaintiff brought his action against defendant on this same writing obligatory, "*et taliter processum est*;" that in Michaelmas, Term, 10 Geo. IV. it was adjudged that the plaintiff should take nothing by his said writ, and that the defendant *eat sine die*.

Twelfthly, The same, alleging the action to have been on this same award.

Replication.—1st, Similiter to non est factum.

Secondly, To second plea, award made 5th of February and setting it out; that the defendant had notice, that although plaintiff on 5th of January, 1829, was ready and willing quietly and peaceably to deliver up to the defendant the dwelling house, &c., as in award, and to perform all other things, yet the defendant did not on the said 5th January pay the 149*l.* awarded, nor since, although often requested, &c.

Thirdly, To third plea, denies that the defendant did on 5th January mentioned in the award request plaintiff to deliver up the house, &c.

Fourthly, To fourth plea denies that the defendant did on the 5th of January request plaintiff to deliver up the house, &c., in as good repair, &c., as in the plea mentioned.

Fifthly, To fifth plea, that before 10th February, viz. 5th February, the award was ready to be delivered to the parties in difference, or such of them as should desire the same.

Sixthly, To sixth plea, that on 5th February, the arbitrators had their award by them duly made, &c., ready to be delivered to the parties or to such as should desire it, and then and there published and made known their award to the said parties.

Seventhly, To seventh plea, precisely as last replication.

Eighthly, To eighth plea, that the arbitrators did arbitrate and award upon the matters stated in the eighth plea.

Ninthly, To ninth plea, special demurrer.

Tenthly, To tenth plea, special demurrer.

Eleventhly, To eleventh plea, that the judgment pleaded was not rendered on the merits, but on account of defects in pleadings of plaintiff.

Twelfthly, To twelfth plea, the same as the last replication.

Rejoinders.—To second replication, special demurrer.

To third replication, similiter.

To fourth “ same.

To fifth “ same.

To sixth “ special demurrer.

To seventh “ special demurrer.

To eighth “ takes issues.

To ninth “ joinder in demurrer.

To tenth “ joinder in demurrer.

To eleventh, that judgment stated on the plea was not for defects in pleading, but on the merits; and vouch the record.

To twelfth, replication, special demurrer.

Plaintiff joins in demurrer to replication to second plea, and to sixth and seventh pleas, and to twelfth plea.

The case was argued by the *Solicitor-General* for the plaintiff, and the *Attorney-General* and *Bethune* for the defendant.

Judgment was given in Hilary term, 10 Geo. IV. on a demurrer to the declaration as it was originally drawn.

The court delivered judgment this term upon the pleadings as above stated.

ROBINSON, C. J.—The declaration being in the common form on the bond, no question arises as to its sufficiency; the defendant, after denying the bond, pleads in his second plea, that no award was made, in the replication to that plea therefore we are to look for the plaintiff's statement of his cause of action; he there sets out the award at length, and assigns the breach; the first question upon this record is, whether in his replication he has shewn a good cause of action; the defendant by his demurrer to this replication denies that he has, and assigns causes of demurrer; and first, with respect to the alleged inconsistency in the award, in directing that the plaintiff may occupy the dwelling house, shed, and appurtenances to fifth January then next, and at the same time directing that the plaintiff shall have no further concern with the farm, there is clearly nothing in it. It does not appear on the face of the award, that the house, shed, &c., are on the farm spoken of, therefore there is no pretence to say there is any inconsistency, nor would there have been any if the fact had been as the defendant would



have us infer it to be Another cause of demurrer assigned is of course the only one relied on, and that turns upon the question, whether the plaintiff has shewn sufficient on his part to entitle him to sue for the money, the payment of which, we have already decided in this same cause, is according to the award to be a concurrent act with the delivery up of house, shed, and appurtenances occupied by plaintiff.

On looking carefully into the authorities on this point, no doubt can remain that the replication is in this respect sufficient. I thought otherwise at first, forming my opinion hastily upon what is said by Sergeant Williams, in his note to 1 Saunders, 320, and on 1 Salk. 171, in both of which authorities there is evidently a want of care in the expression used. In Glazebrook & Woodrow also, 8 T. R. 374, there are several dicta of the judges which favor this demurrer upon the ground I now refer to, but between that case and the present, there is a clear distinction in the facts sufficient to account for the decision, without making it an authority against the sufficiency of this replication.

With these exceptions, the other cases cited by the defendant are either such as cannot be applied to the facts of this case, or are authorities the other way. 2 N. B. 125 ; 1 E. R. 619 ; 5 E. 111 ; 1 Salk. 112, are clearly not applicable, and the case of Morton v. Lamb, 7 T. R. 125, is certainly in favor of the plaintiff, and is sufficient of itself to sustain his replication, unless it could be shewn to be overruled by later decisions. So far from that, however, 1 East. Rep. 205 ; 1 Marshall, 412 ; and 7 Taunt. 314, with many other cases, clearly support the same doctrine.

These are concurrent acts to be performed on a day stated, and they are acts of that nature, that an averment of readiness to perform is sufficient. It would have been so (I think), if the matter had rested on an agreement ; arising from an award the case is, to say the least, not stronger against the plaintiff ; the defendant has the remedy upon the bond which he looked to when he entered into the submission. I am of opinion, therefore, that on the demurrer to the replication to defendant's second plea, the plaintiff must have judgment.

The next pleading to be considered is the sixth plea, and the replication to that plea, to which replication defendant

has demurred. Upon this part of the case I cannot say that I am altogether without doubt ; but as it appears to both my brothers, that the award is shewn by the pleadings to have been sufficiently delivered according to the submission, the plaintiff upon this plea also is entitled to judgment.

The next pleading brought in issue is the seventh plea, and replication thereto, which replication is demurred to ; it turns upon the same point as the last, and is decided by it.

The next pleading brought in question is the ninth plea, which is specially demurred to, and which is clearly bad. It is not very easy to comprehend what the defendant means by it, but clearly it is no answer to this action for the money if plaintiff "*did neglect to have no further concern with the farm.*"

The next plea (the tenth) is also demurred to, and I think on good ground ; the award as to such a cause of action as defendant states in this plea, would not operate as a release of it, and he ascribes to it an effect it could not have.

The next pleading, which terminates in a demurrer, is the twelfth plea, the replication to which is specially demurred to. It is plain, on many authorities, that judgment for defect in pleading, and not on the merits, is not a bar to another action for the same cause. I am of opinion the plaintiff must have judgment on this pleading.

SHERWOOD, J.—I think it unnecessary to remark upon any of the issues at law in this case, except the one joined on the defendant's demurrer to the plaintiff's replication to the second plea. I agree with both my brothers on all the rest. The defendant alleges in his second plea, that the arbitrators made no award, and the plaintiff replies that they did, and sets it out in the following manner : " That all quarrels and controversies, actions and suits in law or equity ; theretofore had, moved, brought, commenced, sued or prosecuted by and between the said parties, do cease, determine, and be no further prosecuted ; and they did further award and order, that the said Benjamin should on or before the fifth day of January then next ensuing pay or cause to be paid unto the said Henry the sum of one hundred and forty nine pounds, lawful money of the province of

“Upper Canada; and they did also award and order, that  
“the said Henry should, on or before the said fifth day of  
“January then next ensuing, quietly and peaceably deliver  
“up to the said Benjamin the dwelling house, shed, and  
“appurtenances, then occupied by the said Henry as a  
tavern, in as good repair as it then was, and that the said  
“Henry should have liberty to secure and harvest the crop  
“sown on the said Benjamin’s farm, &c.” The plaintiff  
then goes on to aver, “That although the said Henry at the  
“day in the said award on that behalf directed, to wit, on  
“the 5th January, &c., at, &c., was ready and willing  
“quietly and peaceably to deliver up to him the said Ben-  
jamin the said dwelling house, &c.. occupied by the said  
“Henry as a tavern, &c., in as good repair as it was at the  
“making of the said award. and to perform the said award  
“in all things on his part and behalf to be performed; yet  
“the said Benjamin did not. nor would, on or before the  
“said 5th January, pay to the said Henry the said sum of  
“149*l.* in the said award mentioned, or any part thereof,  
“nor hath he since paid the same or any part thereof,  
“although often requested,” &c. To this replication  
defendant demurs. The substance of all the special  
causes of demurrers, assigned by him is incorporated in  
the last assignment, which is in the following words: “That  
“the replication contains no averment of the plaintiff’s  
“performance, nor excuse for the non-performance of the  
“concurrent act to be performed by him.” The concur-  
rent act to be performed by the plaintiff here alluded to,  
was the delivering up to the defendant the house, shed, and  
appurtenances stated by the award to be in the possession  
of the plaintiff. The plaintiff contends that a readiness and  
willingness on his part to deliver up the possession to the  
defendant, was all that was necessary for him to do. I  
think the words of the arbitrators in this award, should be  
construed by the same rules of construction as the words  
of the parties to any contract or agreement. Whether an  
agreement be written or by parol, the rules of construction  
are in general the same both at law and in equity, and go  
to establish this maxim, that the intention of the parties

should be sought for, and when discovered should be followed, if lawful, *verba intentioni debuit inservire*. (a) Now it appears to me to be evident, from the language of the award, that the arbitrators intended the defendant should go to the premises to take possession of them on the fifth day of January, and that the plaintiff should be there to deliver the possession to him. The acts therefore, which the arbitrators ordered these parties to perform, were concurrent acts; and it is uncertain which party was to do the first act at the time and place appointed. It is also uncertain whether the parties met at the time and place; neither the plea of the defendant, nor the replication of the plaintiff, shews that fact.

The general rule of law is, that every thing should be taken most strongly against the party pleading, (b) and therefore it might be contended, that the plaintiff should have averred the absence of the defendant if that fact had been at all important. This rule, however, is to be received with some qualifications, for the language of the pleading is always to have a reasonable construction and intendment.— 2 Mod. 104; 6 T. R. 134; Com. Dig. Pleader, C. 25.

It appears by the pleadings now under consideration, that the defendant occupied the premises when the award was made, and there is nothing to show that he was not there on the fifth day of January, but I think it must be reasonably implied, that he was there, because the award contemplates his continued possession of the premises by directing him to give them up to the defendant on that day; on the other hand, the pleadings do not contain the slightest intimation that the defendant was there on the fifth day of January. Under such circumstances, I have nothing to warrant me in inferring that he was there, and therefore I think it must be reasonably intended he was not there. The case in substance then stands thus: the arbitrators directed the defendant to pay the plaintiff 149*l.* on the fifth day of January, and directed the plaintiff to deliver up the possession of the premises to the defendant on the same day. The plaintiff was ready and willing to deliver the possession on that day, but the defendant did not go to the premises to receive it. Now I think it was not the intention of the

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(a) 1 Inst. 217, B.

(b) 1 Saund. 258, note 8.



arbitrators that the plaintiff should go in search of the defendant on the fifth day of January, to offer him the possession, for two reasons; first, because the possession could not be given at any other place than the premises themselves; secondly, because it was the duty of the plaintiff to deliver up the possession of the premises at any time on the fifth day of January when the defendant should be there to receive it. If the plaintiff had gone from the premises on that day, the defendant might have come in his absence to receive the possession, and then the plaintiff would not have been ready to give it according to the exigence of the award. The same rules of construction which apply to covenants, are indiscriminately applied by the courts to every species of agreements, and as I have said before, I think should be applied to this award. The early cases on covenants contain no clear or precise rule of construction; the courts, in almost every instance, where there were distinct acts to be performed by each party, inclined to consider them independent of each other, and to confine each party to his remedy by suit at law against the other. This rule could not fail to work great injustice in many cases, and Lord Mansfield most clearly shewed its absurdity in the case of *Kingston v. Preston*, cited in the case of *Jones v. Barkley*, Doug. 689; that case divides covenants generally into the three following classes:—

First, mutual and independent covenants, when either party may recover damages from the other for the injury he has sustained, and where it is no defence to allege a breach of covenant by the other.

Secondly, covenants which are conditional and dependent, in which the performance of one always depends on the prior performance of the other, and where no action will lie without averring performance or that which is equivalent to performance.

Thirdly, mutual conditions, which are also termed concurrent acts, where if one party is ready and offers to perform his part and the other neglects or refuses to perform his, he who is ready and offers, may maintain an action for the default of the other, although it is uncertain which party is obliged to do the first act.

The case of *Jones v. Barkley*, before mentioned, came under the third class. The acts were concurrent, and the court decided the case precisely according to the rule laid down in *Kingston v. Preston*, that where something is covenanted or agreed to be done by each of two parties at the same time, the one who is ready and offers to perform his part, but is discharged by the other, may maintain an action against the other for not performing his part. In that case there was in fact an offer by the plaintiff to perform his part of a contract, which constituted a condition precedent, therefore it is not exactly like the present case, where no offer was made. The next case which I intend to notice, is *Merritt v. Rane*, 1 Stran. 458 ; the defendant agreed with the plaintiff to sell and transfer to him South Sea Stock, within three days after it should be demanded, and the plaintiff agreed to pay for it upon its being transferred. The plaintiff alleged he appointed a person to demand the stock, and to pay the stipulated price ; that the person so appointed, demanded the stock, and attended the office at the appointed time, but the defendant did not come to transfer it. The question before the court arose on the sufficiency of the declaration, although the demurrer of the defendant was to the plaintiff's replication. It was contended for the defendant, that as the acts were concurrent, the plaintiff should have averred, that he had the money at the appointed time and place, to pay for the stock upon the transfer. Parker, C. J., said "the payment of the money is not a condition precedent, but a concurrent act, and if the defendant had been there the plaintiff must have laid down the money, though not so as to part with it till transfer."

The court afterwards said, "as to the plaintiff's not shewing a tender, we think that ought to come from the defendant by way of excuse, that he was there ready to have transferred if the plaintiff, or any body for him, had been there to pay the money.

The court gave judgment in favour of the plaintiff, and the defendant afterwards brought a writ of error into the Exchequer Chamber, and through to the House of Lords ; but both courts of appeal affirmed the original judgment. The next case I shall mention, is *Morton v. Lamb*, 7 T. R. 125.

The defendant agreed with the plaintiff to deliver him two hundred quarters of wheat, at Shardlow, in one month, and the plaintiff promised to pay for it at the price of 5*l.* per quarter. The plaintiff averred in his declaration, that he was ready and willing to receive the wheat at Shardlow, but the defendant did not deliver it. The defendant pleaded the general issue, and after a verdict had been given for the plaintiff, the defendant moved in arrest of judgment, alleging for cause, that it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery.

Lord Kenyon said, "If this case depended on the technical niceties of pleading, I should not feel so much confidence as I do, but it depends altogether on the true construction of the agreement." In another part he said, "In the case of *Campbell v. Jones*, I thought, and still continue of that opinion, that whether covenants be or be not independent of each other, must depend on the good sense of the case, and on the order in which the several things are to be done; but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time, and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it." Mr. Justice Grose also said, "It is difficult to reconcile all the cases in the books on the subject of conditions precedent, but the good sense to be extracted from them all is, that if one party covenanted to do one thing in consideration of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with non-performance. Here the question is, what was the intention of the parties; they clearly intended that something should be done by each at the same time. The corn was to be delivered at Shardlow to the plaintiff for a certain price to be therefor paid by him, that is at the time of delivery; then the readiness to pay should have been averred by the plaintiff."

LAWRENCE, J., was of opinion, that the plaintiff should have averred a tender of the price. He said, "the tendering of the money by the plaintiff makes part of the plaintiff's

"title to recover, and he must set out the whole of his title." Two of the judges thought that an averment of readiness to pay the money would have been sufficient, for they say the plaintiff should have made the averment, but do not say he should have made any other. The third judge thought the plaintiff should have gone further, and averred a tender. About four years afterwards, the case of Rawson and others v. Johnson, reported in 1 East. 303, came before the same judges, together with Mr. Justice LeBlanc, and it appears to me to settle the present question. It is true that was a case after verdict, where every thing must be presumed to have been proved which could be at all necessary to support the verdict; but I think the court placed little or no stress on that circumstance, as essential to the conclusion at which they arrived; their language shews their judgment to rest on general principles of reason and law. The case was in substance as follows: The plaintiffs in their declaration alleged, that at Leeds, in the county of York, in consideration that the plaintiffs, at the instance and request of the defendant, had then and there bought of the defendant a certain large quantity, to wit, one hundred quarters of malt, at and for a certain price then and there agreed upon between them; he the defendant undertook and faithfully promised the plaintiffs well and truly to deliver to them the said one hundred quarters of malt, when the defendant should be requested; and the plaintiffs in fact say, that although the plaintiffs afterwards requested the defendant to deliver the malt, and were then and there willing and ready to pay the defendant for the same according to the terms of the sale, and although the plaintiffs were ready and willing and offered to accept the malt, yet the defendant did not deliver the malt or any part of it. Upon a motion in arrest of judgment, the objection made to this count was, that it only averred a readiness and willingness of the plaintiffs to pay for the malt, but did not aver a tender of the price agreed to be given by the plaintiffs. Lord Kenyon said, "The defendant undertook to deliver the malt when he should be requested, and the plaintiffs plead they made the request, and were ready and willing to have accepted and paid for it, but that he did not deliver it when requested, or at any



“other times afterwards, but refused to do so.” He also said, “It is reported in the case of Morton and Lamb, that “I said that the plaintiff should have averred a performance “or a readiness to perform his part of the contract; I do not “doubt that I said so, and I still think it was rightly said.” Mr. Justice Gross remarked, “The doctrine in question was “much discussed in the case of Morton v. Lamb, and we then “held, that when mutual acts are to be performed, the “plaintiff, in order to maintain his action for the non-per- “formance by the other party, must shew that he was ready “to do whatever was required to be done by himself.” Mr. Justice Lawrence changed his opinion with respect to the necessity of averring a tender, as he stated in the case of Morton v. Lamb, and said he had since found a case in Plowd. 180, where the form of the declaration was like the one adopted by the pleader in the case of Rawson and others v. Johnson. He also mentioned similar precedents in Hearn’s Pleader, 131, and in Clift’s Entries, 97, and then remarked as follows: “It appears therefore upon the whole, “that this form of declaration agrees with the current of “authorities, that it is not impeached by the case of Morton “v. Lamb, on the authority of which the question was brought “forward, and that it is warranted by the precedents I “have quoted.” Mr. Justice Le Blanc also expressed his views of the case, and I think he stated the general law of concurrent acts with more perspicuity and precision than the other members of the court; his remarks shew the distinction between conditions precedent, and concurrent acts not dependent, and although he does not profess to draw the line between them, still he does so in some degree, by shewing the nature of one of them. That learned judge remarked, among other things, that “according to the cases which “have been determined on this question, neither of the “parties was bound to do the first act or to perform his part “of the agreement before the other. If so, then neither “can be bound to state that in pleading which is equi- “valent to performance. Now a tender and refusal has “always been deemed equivalent to performance, therefore “as performance in this case was not necessary, neither was “it necessary to aver that which is equivalent to it. But

“all that is required of the plaintiffs to shew is, that they did every thing they were bound in fact to do; then if they shew they were ready to pay the price, provided the defendant were ready to deliver malt, that is all that was necessary for them to do, and consequently their pleading a readiness to perform, is equivalent to every thing that they were bound to perform, when the defendant refused to perform his part.”

The three cases before cited are instances of concurrent contracts, which were not dependent; but there may undoubtedly be agreements which are concurrent, but where the words used clearly constitute a condition precedent, or where the whole context when considered together clearly shews the intention of the parties was to qualify the acts in such a way as to make a condition precedent. In such cases performance, or what is equivalent to performance, must be averred by the plaintiff. Every case must rest upon its own circumstances, and although courts may establish general rules of construction, yet those rules must be qualified according to the facts of particular cases. There are no precise technical terms required to make a condition precedent; the intention of the parties is the legal criterion, and that must be determined by the words of the contract, and the nature of the transactions. There are authorities for asserting that contracts are sometimes both concurrent and dependent, as was the case of the Duke of St. Albans v. Shore, R. Bl. Rep. 270; Jones and others v. Barkley, Doug. 689; and Glazebrook v. Woodrow, 8 T. R. 366. There are other authorities to prove that they may be concurrent and not dependent, as in the case of Merrit v. Rane, 1 Stran. 458; Morton v. Lamb, 1 T. R. 125; Rawson and others v. Johnson, 1 East. 203; and Wilks v. Atkinson, 1 Mars. 412, in the Court of Common Pleas. By the last mentioned cases, I think it clear that when contracts are concurrent without containing any condition precedent to make them dependent, it is unnecessary for the plaintiff to aver performance, or anything equivalent to performance. It may be asked then, how can the one species of contract be distinguished from the other? The answer is, by ascertaining the intention of the parties by the words of the contract, or

by the nature of the transaction. There are some cases, I think, where contracts are to be construed to be dependent as a matter of course, unless otherwise expressly provided by the parties ; as if the owner of real property agrees to sell at a fixed price, and to convey on a certain day, and the buyer agrees to pay the purchase money at the same time, because it cannot be reasonably presumed that any one would give a conveyance of lands in the usual manner, and acknowledge the receipt of the consideration without first receiving it.

With respect to the case now under consideration, it appears by the pleadings that the parties had dealings together ; that they were involved in disputes, and could not settle them ; that they agreed to submit every thing to arbitration, and mutually executed bonds to each other in the penal sum of four hundred pounds, to abide the award. That the arbitrators made an award, and thereby ordered the defendant to pay to the plaintiff one hundred and forty-nine pounds, on the fifth day of January ; that they ordered the plaintiff peaceably and quietly to deliver up the premises he then occupied to the defendant on the same day. Nothing whatever appears in the award to shew what induced the arbitrators to make either the one order or the other. The one hundred and forty-nine pounds might have been due to the plaintiff for goods sold, or for money lent ; the defendant or the arbitrators might have found that the defendant had committed a trespass on the plaintiff, and awarded that sum as damages ; at all events there is nothing in the award to shew that the giving up of the possession of the premises was the consideration for the payment of the one hundred and forty-nine pounds to the plaintiff. Had that fact satisfactorily appeared by the award, I think it would have constituted a condition precedent ; as no light, however, is thrown on the question by the award itself, recourse must necessarily be had to the antecedent part of the transaction for information.

It appears that the parties mutually executed bonds to each other in the penal sum of four hundred pounds, as a security for the performance of any award which the arbitrators should deem it just and right to make. The contents and language of the award, joined to this fact, induce me

to conclude that the arbitrators thought the security so taken by the parties was amply sufficient to insure a performance on both sides, and therefore did not intend to give any further security for that purpose. In this view of the case the concurrent acts appear to have been intended as reciprocal acts only, but not dependent acts. The arbitrators might have ordered the plaintiff in express terms to deliver up the possession of the premises before the payment of the money, but they have not done so, and I cannot under all the circumstances say I think they intended that act should be performed before the other; in such case the plaintiff was not bound to aver performance of that act, or anything equivalent to performance, or any excuse for its non-performance.

There is also another circumstance in this case which has great weight. It cannot be intended from the pleadings, that the defendant went to the premises on the fifth day of January, or sent any one there to receive possession, and in my opinion it was not the duty of the plaintiff to go in search of him. I think the plaintiff was bound to remain on the premises the whole of the day to deliver up the possession; if so, then I think he did all which could legally be required of him to do.

The present case, in principle, comes under the third class of contracts particularized in the case of *Kingston v. Preston*; these cases are there described in general terms, for the purpose of drawing the line of separation between independent, dependent, and concurrent acts; still the numerous cases which range under each class respectively, must occasionally be marked by shades of difference in the same proportion as the facts and circumstances are found to differ, and in the same manner as the apparent intention of the parties inclines.

In the present case, I think the plaintiff is entitled to judgment.

MACAULAY, J.—It having been already decided in this cause, that the delivery up of the house, &c., was a concurrent act with the payment of the one hundred and forty-nine pounds, rendering them mutually concurrent conditions, the only question arising under the demurrer to the repli-



cation to the second plea is, whether the plaintiff has sufficiently averred his readiness to perform his part, and has shewn that he has done all incumbent upon him to entitle him to sue for one hundred and forty-nine pounds. In other words, whether upon this special demurrer to the averment of readiness and willingness quietly and peaceably to deliver up the house to the defendant, and to perform the said award in all things on his part, he should have added an offer to do so, or excused the offer by shewing that the defendant discharged him therefrom or prevented his fulfilling the award.

In *Jones v. Barkely*, Doug. 691, the plaintiff avers an offer to assign; a tender of a draft of assignment, and an offer to execute and deliver the same, and that he would have done so, but that the defendant absolutely discharged him therefrom, which was held sufficient. In the argument and notes to this case, several distinctions are suggested, as first, between dependent and independent covenants, conditions precedent and concurrent; an actual performance or tender and refusal in the former case being requisite, but a readiness merely in the latter. Secondly, also, where by doing an act a right of action instantly ensues, and where the refusal or assent is not essential to its consummation, and where an act tendered would, if completed, amount only to an endeavour to entitle the party tendering to a right of action.—8 East. 437; 2 Roll. R. 238. The case in 10 Mod. 190, is of the second kind; there the acts were concurrent, and the plaintiff alleged merely a readiness to assign, and a request of payment.

In the well known case of *Kingston and Preston*, Doug. 690, Loft. 194, Lord Mansfield specifies three kinds of acts, the third of which are, mutual conditions to be performed at the same time, where if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered had fulfilled his engagement, and might maintain an action against the other, though it was not certain that either was obliged to do the first act.

It is obvious the present case falls within the description of those in which the plaintiff could not absolutely perform,

but only endeavour to perform his part, as if the defendant would not come and accept, he could not deliver over to him the house and premises in question. See Doug. 693, where, however, it is admitted in argument by Le Blanc for the plaintiff, that it was incumbent upon him to take every step necessary for him to do, in which the defendant's concurrence was not requisite before he could sue, unless there was a discharge. In the present case (on this principle) the plaintiff might have offered; but if at the house ready, and the defendant did not come, how could he offer? or should the absence of the defendant be alleged in excuse of an offer. See 7 T. R. 127; 12 Mod. 531; Sal. 623; 7 Co. 10; 1 Str. 458.

The cases in Douglas are calculated on the whole to shew, that a readiness and offer, or excuse for the want of the latter, should be averred.—Sal. 112, 171. See 2 Bur. 899, performance or a readiness to perform held necessary to be shewn.

In 4 T. R. 763, *Goodisson v. Nunn*, the above cases are said to establish the rule, that where two acts are to be done at the same time, neither party can maintain an action without shewing performance or an offer to perform on his part. Lord Kenyon, speaking of the old cases, says, that they all admit that where there are dependent acts, no action will lie by one party, unless he have performed or offered to perform his part; which sentiment he repeats afterwards in the same case. In 7 T. R. 125, *Morton v. Lamb*, the case of a contract for the delivery of corn at a specified price, the want of an averment that plaintiff had tendered the price or was ready to have paid for it on delivery, was objected in arrest of judgment. For defendant it was urged plaintiff should have averred an offer, at another time that he was ready to pay, &c. Lord Kenyon says, the plaintiff should shew performance or a readiness to perform, and cites Sal. 112, to same point, and that as plaintiff had not averred that he was ready to pay for the corn, he could not maintain his action against defendant for not delivering it. He does not say a tender or offer should be superadded, or the absence of the defendant averred, he rather assumes that defendant was present, and was to be understood to say, not that he did

not come with the corn, but that he came and did not deliver because plaintiff did not say that he was ready to pay.

Gross, J.—“Each must be ready to perform his part of the contract at the time he charges the other with non-performance, and that the readiness to pay should have been averred by the plaintiff.”

Lawrence, J., says, “the tendering the money by the plaintiff formed part of his title to recover. In *Glazebrook v. Woodrow*, 8 T. R. 366-7, defendant pleads a readiness to accept a conveyance of plaintiff and pay if plaintiff would have tendered the same, he does not aver any offer to pay, yet that plaintiff did not convey.”

It was held plaintiff could not recover. Lawrence, J., said, “the payment could not be enforced till a conveyance was made, or at least offered to be made.” In 1 East. 203, *Rawson v. Johnson*, an action for the non-delivery of malt which the defendant had undertaken to deliver on request at a certain price, it was held sufficient for the plaintiff to aver a request and readiness to accept and pay, without alleging a tender of the price. The case of *Morton and Lamb* is dwelt upon as much in point; and Lord Kenyon in giving judgment for plaintiff says, he thinks it was rightly said by him in *Morton v. Lamb*, that plaintiff should have averred performance or a readiness to perform. Gross, J., said, that in the above case (7 T. R. 125) it was held, that plaintiff must shew he was ready to perform whatever was required to be done by himself. See also the decision of Lawrence, J., 1 East. 630; *Plow.* 180.

*Rawson v. Johnson* expressly decides that a readiness without a tender is sufficient to be alleged, and relies upon *Morton v. Lamb*, as in point. *Le Blanc* is peculiarly pointed; he says neither of the parties being bound to do the first act, or to perform his part of the agreement before the other, neither was bound to state that in pleading which was equivalent to performance. That a tender and refusal had always been deemed equivalent to performance, wherefore as performance in that case was not necessary, it was not necessary to aver that which was equivalent to it, plaintiffs being only bound to shew that they did every thing they were bound in fact to do, and that if they shewed they were

ready to pay the price, it was all they were obliged to do, and that pleading a readiness to perform is equivalent to everything that they were bound to perform, when the defendant refused to perform his part.

It is to be remarked that the defendant's refusal is alleged in the usual general terms observed in *assumpsit*.—1 Mar. 412, *Wilks and Atkinson*. In an action for not delivering goods according to agreement after due, it is not necessary to adduce evidence to support the averment that the plaintiff was ready and willing to accept and pay, which it was objected plaintiff should do, on the authority of *Rawson v. Johnson*. Gibbs, C. J., said the delivery of the goods and payment were concurrent acts, and that it was not necessary for the plaintiff to prove that he had offered the money to the defendant, till the defendant was ready to perform his part of the contract by delivering the oil; by the demand which he made on the defendant he shewed his readiness to perform his part. 2 B. & P. 447, *Waterhouse v. Shinner*, a case very similiar to the foregoing, and in support of a rule that a readiness to pay is sufficient upon contract to deliver and pay for goods. The court say, the case of *Rawson v. Johnson* explained *Morton v. Lamb*, and that with the former they were perfectly satisfied.

No distinction is taken between agreements to buy or sell goods, and other contracts; the distinctions seem to rest on the acts being concurrent, and neither of them conditions precedent.

*Smith v. Woodhouse* in error, 2 N. R. 233, does not impugn the rule, and it went off on a different ground; 2 N. R. 355, is also in point: *Levy v. Lord Herbert*, 1 Mar. 56-7; *Taunt.* 314, it was held that an action of *assumpsit* for not delivering a bond and other securities pursuant to an agreement, where the consideration money was to be paid on the receipt of the securities, it is not necessary to aver a tender of the money, readiness to pay being sufficient. This was a special demurrer; the courts say, that in *Rawson v. Johnson*, there was no refusal and discharge, and that C. J. Gibbs in *Wilks v. Atkinson*, and Lord Kenyon in *Morton and Lamb*, decided that where acts are concurrent, it is sufficient for the party suing for a non-performance, to aver his readiness to



perform his part; More, 500, also in point.—Saunders' Pleading, 137; 8 E. 437; 5 E. 107; Sal. 623-4; 2 Star. N. P. C. 279; 2 H. B. 130; 4 Bing. 435; 2 Bing. 213.

Now on the subject of awards, it is established that unless specially provided by the award, it is not incumbent upon one party to give notice thereof to the other, both being bound to take notice of the same.—Saund. 62 (4); 2 Buls. 144; Watson on Award, 207-8.

In *Young v. Rowe*, 2 B. & B. 234, Bayley, J. said, where money is awarded to be paid at a particular time and place, that the plaintiff in suing never avers that he was at the place at the time, but that readiness is matter of excuse to come from defendant. He remarks that the dictum in Mr. Baldwell's Treatise, page 194, is inaccurate, and proceeded from a misconstruction of the case of *Phillips and Knightly, Fitzgibbon*, 53, in which upon recovering the money plaintiff was to give the defendant a convenient indemnity, there were therefore to be two concurrent acts—part payment of the money, and giving the indemnity; and the plaintiff could not sue for the money without shewing a readiness on his part to give the covenant, which he had not done. He then refers to cases of rent, which being payable either on the land, or at some other specified place, the plaintiff in suing does not aver an attendance at such place, but a readiness at the place to pay is averred by the defendant (if justified by the facts) and the non-attendance of plaintiff alleged.

Upon a review of all the authorities, I am disposed to uphold the replication as sufficient. The plaintiff alleges that on the day he was ready and willing to deliver up the house, and to perform the said award in all things upon his part to be performed, yet that the defendant did not pay on or before the day or since, though often requested.

I think the cases in which a readiness being averred, has been held sufficient, afford the best guide in cases of awards. Some elementary writers say, that the principle to be extracted from these cases is, that where a payment is to be made for goods to be delivered, readiness to pay is sufficient; but I do not find such ground adopted by the court in any case as the basis of the decision. The principle seems to me to be, that where the acts are concurrent, a readiness is

all in the first instance that need be shewn. A performance or excuse thereof is sufficient where the condition is precedent ; and the cases do not establish, as a rule, that in the event of mutual conditions, the party desiring to enforce the contract must elect to make his part of the agreement a condition precedent, and act accordingly ; but that he must shew himself to have been in a situation to perform it, and ready to do so : *prima facie* that is sufficient. To apply this reasoning to the present case, plaintiff desiring to sue defendant for the 149*l.*, it is incumbent on him to shew that at the day he was ready to perform the concurrent act of delivering up the house ; to this the defendant might answer, that he was ready to pay upon receiving the house ; the plaintiff would then be obliged to shew that he took a further step, and offered to deliver up the house on being apprised of defendant's readiness to pay ; the defendant would then be called upon to shew that he kept even pace on his part, and offered the money ; if each met the other in this way, no action would accrue to either ; and if after a mutual tender, each withholding till the other completed his part, the plaintiff desired to place himself in an attitude to sue, it would be necessary for him actually to deliver up the house ; if on receiving it, the defendant withheld the money, he of course could then avail himself of his right of action. In the latter event a complete performance might be averred, and it makes no difference in the agreement that the several supposed steps are suggested as if developed in the pleadings. The plaintiff, of course, when driven to sue, would at once allege acts towards performance on his part, to whatever extent necessary exceeding those of the defendant, so as to sustain his suit. If, the plaintiff being ready, the defendant took no step and shewed no readiness, an offer to deliver up would seem an act of supererogation, not called for unless the defendant was ready to pay on receiving possession.

The plaintiff avers his readiness ; the defendant does not deny it, nor does he allege that he was also ready, or in any other way throw the default upon the plaintiff.

It is not assigned as a cause of demurrer, that the plaintiff does not shew where the house was, and aver a readiness at the house ; he avers a readiness at Ernestown ; the award

shews plaintiff to have been in possession of the house, and it is to be presumed he was (if ready) ready at the place. If the defendant did not come, he could not make an offer; and as the money was payable generally, the defendant was not required to be present at the house with a view to payment; and it seems reasonable, that if the plaintiff was ready, he need not add as an excuse for not going further, that the defendant did not come, or that he refused to accept. The presumption is, that he was not in fault, and the onus is upon the defendant to exonerate himself from his liability to pay. Independent of the concurrent act, it was the defendant's duty under the award, to find out the plaintiff and pay the money.

The cases seem clearly to shew, that if the defendant, who is to pay the money, was suing plaintiff, who is to deliver the house, an averment like the present, of a readiness to pay on receiving possession, would be sufficient, and if so, why should not the converse of the proposition equally hold.—See Arch. Plg. 85, 86.

Awards are treated in construction usually as if they were contracts; still when questions under them are reduced to nice points like the present, much might be urged in favour of an application of the most liberal cases to them, for though acts be required to be done concurrently, the one is not strictly the consideration of the other; and admitting that the terms of this award render the acts concurrent, still I think that as there are clearly no conditions precedent, an averment of a readiness to deliver up the house, and to perform the award in all things, and of defendant's default in paying, though often requested, is sufficient to entitle the plaintiff to sue for the 149*l.*, and to sustain the replication to the second plea on this demurrer.

These views embracing all the causes of demurrer that seem to me material, I have not noticed them in detail.

The next subject is, the defendant's demurrer to the plaintiff's replication to the defendant's sixth plea and seventh plea. The submission requires an award to be made in writing under the hands and seals of the referees, or two of them, and ready to be delivered to the parties in difference, or such of them as should desire the same, on or before the 10th of February, then next.

The sixth plea avers, that the referees did make an award under hand and seal before the 10th, to wit, on the 5th February, sets out the award, and adds that afterwards the plaintiff on the 10th of February requested one of the referees to deliver the same according to the condition, but that he did not, nor did the others do so.

The seventh plea is similar, except that it avers a request and refusal by all the referees.

The plaintiff replies, that before the 10th, to wit, on the 5th, the referees had their award duly made, and ready to be delivered to the said parties, or such as should demand the same, and then and there published and made known the said award to the said parties. The defendant demurs, on the ground that the plaintiff admits a neglect to deliver upon request on the 10th February, contrary to the conditions.

It is laid down as a general rule, upon a submission like the present, that it is a sufficient averment, that the award was made by the day, without adding that it was published, or ready for delivery.—Watson, 80, 207 ; 1 Saund. 326-7 ; 1 M. 3 ; Cro. Car. 541 ; 6 Mod. 82 ; 2 Ld. Ray. 989 ; 1 Ld. Ray. 114 ; Caldwell, 128 ; 4 E. 584 ; Caldwell, 190-1, 51.

It is otherwise where an actual delivery or readiness at a particular place is required by the submission, so that in ordinary cases the replications sufficiently shew a valid award ; but it is said in Saund. 326-7 (n. 3), that if either party on the last day request the arbitrators to deliver the award to him, and they neglect or refuse to do so, the bond is void, and the defendant must not say no award, but should plead the matter specially, viz : that he requested the arbitrators to deliver the award, and that they refused to do so.—3 Mod. 331, and cases in notes ; Carth. 159 ; Shaw, 98, 242, S. C. ; 6 Mod. 176 ; 1 Ld. Ray. 114 ; 2 Ld. Ray. 989 ; Cro Car. 541 ; Har. Dis. 399 ; Dyer, 218 ; 1 Lutw. 324 : 5 Co. 103 ; Cro. Jac. 577 ; Caldwell, 197.

The defendant admits an award made on 5th Feb., and avers a request and neglect on the 10th ; the plaintiff replies that before the 10th, viz., on the 5th, the referees had made their award ready to be delivered and published, and made known the same.



Some cases imply, that when an award is made in writing, it is *ipso facto* ready to be delivered; see 1 Saund. 327.; 4 East. 584. Lord Ellenborough says, the award was complete when it was ready to be delivered within the time and place for actual delivery, the arbitrator was then *functus officio*, &c.; and others shew that after the award is made, an arbitrator cannot alter or controul it.

The demurrer seems to admit that the award was made and published, and ready to be delivered before the ultimate day. The submission required it on or before, and the defendant admitting the fact before, alleges a demand and neglect afterwards on the day; if ready before, the condition would seem fulfilled.

8 E. 54; 6 E. 309; Watson, 83.—These cases shew that when once an arbitrator has executed and published his award, he is *functus officio*; the award is then ready for delivery, and being once ready for delivery the condition is complied with; were it competent to an arbitrator afterwards to retract and withhold the award, as not ready for delivery in breach of the condition, the utmost confusion might be the consequence. Here it is alleged, that before the ultimate day the referees made and promulgated their award, and that it was then ready for delivery. The defendant's allegation is, that afterwards on the 10th he requested it, and that the arbitrators did not deliver the award; he does not say they *refused* to do so.

It appears therefore that on the 5th, the award was made, published, and ready to be delivered: if so, is there not an end of the matter, although on the 10th it was requested, and not delivered or refused?

In 1 Saund. 169 and 170 (n. 2), the plaintiff in his declaration avers an award (which was required to be made on or before the 16th March) to have been duly made, to wit, on the 16th March; defendant demurred because it was not expressly affirmed to have been made on or before that day, but only under a *scilicet*.

In this case the court held the allegation sufficiently positive, and that they would intend the award was made on that day and no other.

A similar opinion was held on special demurrer, 3 Bur. 1729; see also 6 Mod. 244, S. P.; Cro. El. 439, debt upon an escape alleged in London, 18 Dec. An escape at D. the 16th; fresh suit and recaption, the 17th Dec., traversing the guilt of the defendant, *aliter vel alio modo*. It was objected that the defendant did not answer the escape alleged *aliter vel alio modo*, not relating to time, but the manner of the thing alleged, and the court were of opinion that the plea was ill for this cause.

I am of opinion, for the reasons and upon the authorities above mentioned, the demurrer should be overruled.

The third subject is, the defendant's demurrer to the plaintiff's replication to the defendant's twelfth plea.

The first point is, to consider whether a former action on the award and judgment for the defendant, is a bar to an action on the bond. Where the cause of the action is the same, a judgment between the same parties is binding on each; and it is immaterial that the form of action is different, if the cause of action be the same. 2 Bl. R. 827, a judgment in debt is a bar to assumpsit on the same contract, 4 Rep. 94; so a recovery in trespass bars trover—Com. Dig. Act. R. 3. But, where a party mistakes his form of action, he will not be concluded.—Cro. El. 668; 2 Saund. 47 p.; 2 Moore 157. Although debt might lie on the award for 149*l.*, it is clear debt would not lie for other matters therein provided, and the present declaration does not disclose for what breach the plaintiff is suing; it might be the refusal of a release.—2 Saund. 62. a. n. (5); 1 Bur. 278; 1 H. B. 547.

The case in Saund. 73, would imply that after failing on the bond, debt might be brought on the award, and why not vice versa. The present action is grounded on the penalty, it is debt on specialty.

I rather think the defendant should have set out the award, and then have pleaded specially as to the 149*l.*, the former recovery; such a plea might have *prima facie* been a bar quoad that part of the award. To such plea the plaintiff might have urged the technical ground of the judgment against him, or admitting its conclusiveness, have suggested other breaches of the award involved in the action upon the present plea; it is impossible to assume *prima facie* that the

defendant could have recovered in an action of debt on the award, a judgment conclusive against the plaintiff in all respects. The plea sets out no award; it refers to other pleas (2 H. B. 131) which is sufficient---4 Bing. 435. And the plaintiff having as yet assigned no breaches, he may be proceeding for default of a release or disturbance in reaping the crops, &c.—2 Mod. 157.

Mansell on Demurrers, p. 142, says, if judgment has been given against the plaintiff in any preliminary proceeding, such as upon demurrer, such judgment will be no bar.

1 Mod. 207, is a leading case, in which the whole of the pleadings in the former action were set out in the defendant's plea, and the plaintiff demurred on the ground that the judgment was given not on the merits; but for misleading. By analogy, in this case, the plaintiff should have set out the record in his replication, and then demurred, or have pleaded *nul tiel record*.—2 Bl. 831; 2 Mod. 42; 2 Lev. 210; 5 Co. 33; 6 Co. 8. It appears to me, the plea and replication are both bad; the plaintiff should have set out the record and demurred, and shewn that it proceeded on defective pleadings.—2 Bing. 213.

I think the plea is bad, which prevents the necessity of advertng to the replication, which I also conceive to be vicious. Had a sufficient plea been pleaded, the plaintiff should have set out the former record and demurred, and shewn as cause, that the former recovery, as would appear upon inspection, proceeded from defective pleadings, which defect was amended in the present action, and have prayed judgment by reason of the variance that must in that particular prevail between the two suits.—2 Bing. 213.

As to the defendant's ninth plea, nothing is said in support of it, and it seems clearly bad.

As to the tenth plea, the cases abundantly shew, that a release to the time of the award did not vitiate the same.—Watson, 110-1, and 138; Cald. 125; 10 Mod. 201; 12 Mod. 116; 6 Mod. 34; 2 Keb. 471; 1 Bur. 278; Sal. 74; 8 Taunt. 698; 1 Saund. 324, n. (2); 1 Lev. 188; 2 Bl. 1117; Com. Dig. Ab. E. 19; 1 Burr. 281; 3 Lev. 344; 2 Saund. 293, n. (1); Gwll. 858; Cro. Jac. 353; Cro. Jac. 206; Hawk. 399.

Upon the whole I am of opinion, judgment should be for the plaintiff on all the demurrers.

*Et per Cur.*—Judgment for the plaintiff.

CAMPBELL, EXECUTOR OF STEWART, LATE SHERIFF OF  
THE JOHNSTOWN DISTRICT v. LEMON.

A bond, with a condition that a person should confine himself to the limits of the Johnstown District gaol, and should not depart from the same, without payment, &c. &c., (the person not being confined in the gaol, nor within the limits, at the time of the bond given) void by 23 Hen. VI., cap. 9. Where the condition of a bond is set out as an oyer, and it appeared on the record by that means that the bond is within the stat. 8 & 9 Will. & Mary, cap. 11, the plaintiff ought to suggest his breaches before trial.

The *Solicitor-General* for the plaintiff moved in Michaelmas Term last for a new trial on the ground of misdirection.

Debt on bond. The defendant craved oyer, by which it appeared that the bond was subject to a condition, that one Phillips should confine himself to the limits of the gaol of the Johnstown District, according to law, and should not depart from the same without payment of the money due to one Boyce on a writ of *capias ad satisfaciendum*. The defendant pleaded *non est factum* only, and the plaintiff added a similiter, but assigned no breach of the condition.

It was objected at the trial, that the plaintiff added a recover without assigning a breach, and assessing his damages at some future period.

It appeared in evidence at the trial, that at the time the bond was sealed and executed, the defendant in the former action, Phillips, was not on the limits, but some miles distant from thence.

The jury, under the direction of the Chief Justice, found a verdict for the defendant.

The rule  *nisi* having been granted, *Bogart* shewed cause.

In the first place the bond appears, by the plaintiff's own shewing on oyer, to be subject to a condition, which condition is set out without an averment of the breach of it, and without its being alleged in any manner how the bond became absolute. The court found their judgment on the whole record, by which it is plainly shown to them, that unless a certain condition be broken, the bond is void, which



for all that appears to the court, may yet be the case. The assignment of breach is made absolutely necessary by the statute 8 & 9 Will. III. chap. II; and the note 2 Saund. 187, (a) shews strongly that this must be done before verdict.

Secondly, the evidence given at the trial shews the bond to be void from the beginning. The person for whose remaining on the limits it was a security, not being at the time a prisoner confined in the gaol, and therefore not coming within the provincial acts concerning gaol limits—2 Geo. IV. chap. 6; 11 Geo IV. chap. III. The condition was besides impossible to be performed; the execution of the bond would be breach of the condition, inasmuch as it would be impossible for a person to remain in a place without being first there. The bond being taken by the sheriff under colour of his office, for ease and favour to a party arrested in not taking him to gaol, is void under the statute 23 Hen. VI. chap. 9; and this act need not be specially pleaded as was formerly contended; it has been decided to be a public act, of which the court will take notice, when it appears by the facts stated on the record that the statute applies.—1 T. R. 421; Sheppard Touch. 372; 3 Lev. 76; 2 T. R. 571; Co. Lit. 206, a.

*Solicitor-General*, in reply.—At common law the plaintiff need not have assigned any breach; it was for the defendant, when it appeared by the oyer that the bond had a condition, to have pleaded performance of it; by not so doing he precluded himself from saying that he had performed it. The breaches might have been assigned at any time under the statute, which has nothing to do with the judgment, but only with the sum to be levied, which according to the statute must be ascertained by an assessment. The jury at the trial in cause had simply to try whether the defendant made this bond or not, and they have found against the evidence, in giving a verdict on that issue for the defendant as to the execution of the bond, when the prisoner was not yet confined within the gaol. The statute must have a reasonable construction, and as in the case of bail bonds, though the statute 23 Hen. VI., chap. 9, only mentions persons in custody, yet it has been held constantly that an arrest is not necessary to make a bail bond valid; so in this

case ought to have immediately gone within the limits and remained there; not having done so, the court will not allow the sheriff to suffer.

ROBINSON, C. J. (after stating the case)—At the trial I thought the plaintiff was not entitled to a verdict as of course upon proving his bond, although the only issue on the record was *non est factum*. He contended, however, that he must necessarily succeed on this issue upon proving his bond, and that he might afterwards suggest a breach and assess his damages.

As the question was on the record, I allowed the case to proceed, retaining nevertheless the opinion, that the sheriff, or which is the same thing, his executor, before he could be entitled to a verdict on such a bond as this, after the condition had been stated by himself, ought to have averred and proved a breach, and that he could not go for the penalty.

When the subscribing witness was called, it appeared that this bond was given before Phillips had been taken to gaol, or within some miles of the gaol, and that it consequently was not a bond given to enable a prisoner actually confined in gaol, to have the benefit of the limits. I thought a bond taken under such circumstances did not come within our stat. 2 Geo. IV., and directed the jury to find for the defendant, which they did. The fact that the bond was executed before Phillips had been imprisoned, though after he had been arrested, and while he was in the custody of the sheriff, was elicited by the defendant from the plaintiff's witness, upon cross-examination. The plaintiff offered no evidence to refute it, nor did he prove that after the bond was given, the debtor, Phillips, had been ever taken to the limits, and of course if he had not he could not have escaped from them. The defendant indeed contended that these circumstances were irrelevant on the trial of the issue before the court, for that if they rendered the bond void, they should have been pleaded as a defence, and that nothing now could be enquired into, but whether the bond, such as the declaration set forth, was executed.

At the trial, I thought the plaintiff's recovery impossible, upon both grounds; first, because though it appeared on the

record that the bond was given to him as sheriff, subject to a certain condition, he had neither averred nor proved any such breach of a condition as was necessary to give a right of action on the bond; and secondly, because it appeared that the bond was given before the prisoner had been taken either to the gaol or to the limits, and a condition that he should not depart from thence was inapplicable, when for all that appeared he had never been there, and the bond might have been no otherwise forfeited than by reason of the condition being broken at the moment it was executed. Such a bond, I thought, was not within the statute, upon the authority of which it could alone be maintained.

Upon both these points I have been at much pains to satisfy myself since the trial, and though I have had doubts whether I ought not to have allowed the plaintiff to recover, I am now satisfied that the verdict was properly rendered for the defendant.

By the common law, a sheriff might, as I conceive, have taken a bond from sureties to indemnify him against the consequences of any indulgence he might choose to shew to a prisoner in execution. If he shewed any such indulgence contrary to the command of the writ, he would undoubtedly be liable, but still he might have enforced the bond he had taken for his protection. This seems to me to be clearly admitted by the court, in the case of *Dive v. Manningham*, Plow. Com. 67, in which case the effect of the statute 23 Hen. VI., ch. 9, made against bonds for ease and favour, is much discussed, and several principles are laid down which are material to be considered here. But however it may have been before, since the passing of that statute it is very clear, that any bond taken by the sheriff, by the colour of his office, for indemnifying him against the consequences of indulgences illegally shewn to a prisoner in execution, is absolutely void; and in case of *Dive v. Manningham*, it was made a point and expressly decided, that a bond for such a purpose taken from a person as surety, and not being himself in custody, is equally void, as if it were a bond taken without authority from the person himself who was in custody upon execution. It is further adjudged in that case, that bonds prohibited by the statute are so wholly void, that

in pleading the statute in bar, the defendant should conclude "*et sic non est factum*," and not pray judgment "*si actio*," because, as is said by Montague, C. J., it never was the defendant's deed, being void from the beginning. If, therefore, no such act as our Gaol Limits Act had been passed here, it is clear this bond would be absolutely void under the statute 23 Hen. VI., chap. 9, and must have appeared to the court to be so upon the record, and independently of all evidence; because in the condition set out on oyer, it appears that the debtor was in the sheriff's custody in execution, and as it did so appear, the court could not have allowed the plaintiff to recover, however the defendant might have failed to point out the illegality, and to have availed himself of it by formal pleading. This point also is clearly laid down in the case I have referred to in Plowden, which authority is made the foundation for many more modern decisions upon that important principle, so that independently of any very modern authority, it is clear that if in consequence of the condition being set out on oyer it appeared to the court that this bond taken by the sheriff was absolutely void, the plaintiff cannot recover, although its illegality has not been specifically pointed out nor the statute pleaded, and although the defendant has contented himself with barely pleading *non est factum*. The case of Samuel v. Evans, 2 T. R. 569, is expressly in point, and shews that the older authorities of Whelpdale's case, 5 Co. 119, and the case of Johns and Lawrence, Cro. Jac. 249, which last, however, is very distinguishable from the present case, cannot be safely relied on. But the decisions have clearly gone a step further in overruling the former doctrine on this subject; and they have established that in a case like the present, if the facts are such as to shew that the bond was originally void, as being contrary to the statute 23 Hen. VI., chap. 9; such facts may be received in evidence upon the general plea of *non est factum*, and a special plea concluding *et sic non est factum*, which is commonly called a special *non est factum*, is no longer necessary. The case of Thompson v. Rock, in 4 M. & S. 338, is exactly in point.

In applying these principles to the case before us, it is to be considered, that in England the regulations of the court



have established the same state of things in regard to the custody of debtors in execution that prevails here under our acts authorising the gaol limits. The King's Bench Prison being under the control of the Court of King's Bench, that court has, by various rules published from time to time, from the reign of George I. downwards, extended the limits of the prison, by declaring that certain spaces in its vicinity shall form part of it. The sheriff therefore has authority, under these rules, to keep debtors in execution, either within the walls of the prison, or any where else within those limits, as he may think fit; they are regarded as in prison so long as they are within these limits, and it is not till they pass beyond them, that the sheriff is liable for an escape. But as the sheriff is responsible for their safe-keeping, being liable even when they break the walls of the prison, he is of course not compelled to give them the indulgence of any limit beyond the actual walls, and in practice he does confine them within the walls, unless they make him secure by such securities as he will accept, and then he allows them the benefit of the rules.

In taking this security, whether by bond or otherwise, the sheriff does not in England contravene the 23 Hen. VI., ch. 9, because he is not letting the prisoners out of prison, or out of ward, which are the expressions used in the statute. And so it is in this province, under our own statute, 2 Geo. IV., ch. 6, allowing the benefit of gaol limits; so far as regards debtors in execution, these limits are made part of the gaol, and the sheriff by letting the prisoners enjoy them is not suffering an escape, even if he should take no security. As he incurs great risk, however, by relinquishing the security which the walls afford, he is not bound to do so unless the prisoner shall indemnify him. We stand in this respect precisely on the same footing as in England, except that in England the King's Bench extend by their rules the limits of their prison; and here the legislature has done it.

If, therefore, either in England or here, the sheriff having taken his prisoner, and had him in custody, places him upon the limits instead of keeping him within the walls, he does nothing that could be wrong at common law, and he clearly does nothing against which the statute 23 Hen. VI., was in-

tended to guard; and it is therefore clear, in my opinion, that any obligation, which under such circumstances the sheriff may take for his security, will not be made void by that statute; if he takes an undertaking, not void from being insensible or repugnant, he can recover upon it, I think, without having his action prejudiced by any thing in that statute, because that statute applies only to obligations taken for the illegal purpose of indemnifying the sheriff, when, contrary to his duty, he lets the prisoners out of ward whom it was his duty to retain.

To consider this case, then, upon the objection which induced me at the trial to direct against the plaintiff's right to recover.

The first turns entirely upon the pleadings; the peculiarity is, that the defendant having demanded oyer of the bond and condition, they are set out on the record; and then the defendant taking no notice of the condition, pleaded that the bond is not his deed. The plaintiff considers, that on this plea, and without any suggestion of a breach of the condition, which thus appears on the record, he must recover if he proves his bond, though his declaration takes no notice of a condition, and of course contains no averment of a breach.

In a common case between party to party, having no reference to the office or duty of sheriff, it seems to have been once thought doubtful what course the plaintiff could pursue since the statute of William and Mary, for assigning breaches, when he had omitted to set out the condition in his declaration, and the defendant pleaded *non est factum*; the statute providing for a suggestion *after judgment*, and that in three cases only, namely for judgment on demurrer, by confession, or *nil dicit*. Mr. Serjt. Williams, in his notes to 1 Saund. 58, seems to suppose, that the plaintiff being at issue on *non est factum*, and having stated no breach in his declaration, would find a difficulty in proceeding. The case of Ethersey v. Jackson, 8 T. R. 255, seems to have removed this difficulty; for there, upon pleadings precisely similar to those before us, the parties were at issue on *non est factum*, the declaration being on the bond merely, and a condition being afterwards set out on oyer. The plaintiff then entered a suggestion on the roll, under the statute, and assigned a

breach, and the court determined, that as the statute allowed suggestions after judgment *a fortiori*, they might be made before; so that it is clear that in any case like the present, the plaintiff might suggest breaches after issue joined, and before the trial.

It then remains to be considered whether he *is bound* to do so in all such cases; and if not, whether he is bound in this particular case of a sheriff's bond, or whether he may go to trial without suggesting a breach, claim a verdict on the bond, and afterwards enter his suggestion, as the defendant contended he might do here.

I am inclined to think that the plaintiff could not in any case, after the condition had been set out on oyer, plainly shewing the bond to be one within the statute 9 & 10 Wm., ch. 11, recover upon the issue of *non est factum*, and take judgment on the bond. Mr. Serjt. Williams, after decision in the case of Ethersey v. Jackson, says in a note to 2 Saund. 187, alluding to that case, "If the plaintiff should *inadvertently* recover a verdict on the issue of *non est factum*, without entering a suggestion on the roll, it may be asked whether he can do so afterwards before judgment." He concludes, upon the principle of that case, that he could; but in his mode of putting the question, he seems to suppose a case where the condition has not been set out on oyer, and where consequently the repugnancy of allowing him to recover in opposition to the statute, as upon a bond without condition, would appear upon the record; the latter case, which is that before us, would be stronger, and yet he says, "if the plaintiff should *inadvertently* recover a verdict on *non est factum*, without entering a suggestion." This shews, I think, that according to Serjt. Williams's impression the plaintiff could not recover on such a record, otherwise than by inadvertence; and that the obligation under the statute to assign breaches might be urged at the trial to prevent his recovery, as upon a bond without condition. It seems to me, that the law is so. The statute is in many cases declared to be compulsory; breaches *must* be assigned, and the statute, in allowing them to be assigned after judgment, on demurrer, confession, and *nil dicit*, which preclude the necessity for a trial, gives a convenient course of carrying its provisions into effect; but

where a trial is necessary, as in this case, and the parties are before a jury, the statute will not, it appears to me, allow that the plaintiff shall recover upon a bond in the same manner as before the statute was passed, though it manifestly appears to the court and upon the very record, that the very sum in the bond is not necessarily the sum to be recovered; and moreover that nothing is to be recovered unless a condition has been broken, upon which the bond depends. Unless the N. P. case of Governor & Co. of the Chelsea Water Works v. Cowper, 1 Esp. N. P. C. 276 (which is obscurely stated) can be considered to be in point, I do not find anything expressly affirming this view of the question. See on this, 5 T. R. 636, Ethersey and Jackson, 8 T. R. 255. But whatever may be the case in general, I have no doubt that a sheriff suing, as appears by the record, upon a bond taken for indemnity under the Gaol Limits Act, cannot be allowed to recover, without proving that the debtor did withdraw himself from the limits. His right to recover, the amount he shall recover in the action, are both made (by the second section) expressly to depend upon the condition, or rather the breach of it; he is driven into proof of that, and cannot recover as upon a single bond; he is acting under the statute, and must pursue it. The case of Dive v. Manningham, already quoted, and the judgment of Mr. Justice Buller, in Samuel v. Evans, negative the idea that the sheriff could recover as upon a bond single and without condition.

But this point applies with greater force against the plaintiff, if the facts are assumed on which the second objection is grounded, namely, that the bond was taken not after the debtor had been taken to gaol in execution, but before he had been confined, and while he was yet some miles from the gaol and gaol limits. If the bond so taken is not within our statute, 2 Geo. IV. ch. 6, then it is absolutely void, as being against 23 Hen. VI., ch. 9. Upon this point it was probably material to have shewn, whether the debtor was immediately upon the bond being executed taken to the gaol limits, and after being placed there escaped. For all that appears in evidence, he never was confined within



the gaol limits; and that being so, there is clearly, in my opinion, no evidence to shew this a good bond under the statute; if he never was on the limits, he never could have withdrawn from them.

What the plaintiff could have proved, I know not; he offered no evidence to any point but the execution of the bond.

Upon the evidence, as the case was left, I think the bond was void, because not shewn to be taken agreeably to our statute, and if not, then it is clearly a bond prohibited by the 23 Hen. VI., and the evidence to shew this was properly received upon this issue, according to the case of *Thompson v. Roch.*

If I thought the plaintiff could recover, notwithstanding the bond was taken before prisoner had been confined in gaol, I should desire to give the plaintiff an opportunity of supplying whatever he has been deficient in, by allowing a new trial, but I am not clear that we could do that consistently with established practice. At the trial the plaintiff took his own course, and was restrained in nothing, and he did not ask for a non-suit, but went to the jury persisting that the proof of the bond was all that was necessary to entitle him to recover.

SHERWOOD, J.—The bond upon which this action is brought, was given to the late sheriff of the district of Johnstown, under the provincial statute 2 Geo. IV., ch. 6, since repealed, and re-enacted by the II Geo. IV., ch. 3, conditioned that one Phillips, a debtor, arrested on a writ of *capias ad satisfaciendum*, should not withdraw from the gaol limits of that district. The arrest was made at Maitland, several miles from the gaol, the bond was executed there, and the prisoner was never taken to gaol. The defendant is one of the bail, and after obtaining oyer of the bond, sets out the condition, and pleads *non est factum*. At the trial he shewed the facts of the case in evidence, and insisted that the sheriff had no legal authority to take the bond, because the debtor had not been confined in gaol on the execution, and consequently was not within the provisions of the statute; or in other words, that the bond was a nullity.

This is therefore the first question. It appears to me there is a clear distinction in the common law relative to debtors arrested on mesne and final process; on mesne process the sheriff is allowed greater discretion than on process of execution; and the reason I take to be this, the sole intention and use of the former is merely to compel the appearance of the defendant for the purpose of trial, and that end is fully attained if the defendant be in court to answer the exigency of the writ. On this principle, it has been determined, the sheriff may take a bail bond under the stat. 23 Hen. VI. chap. 9, without arresting the defendant at all, although the words of the act expressly apply to persons arrested or in custody of the sheriff or other officer.—1 Stran. 643.

The intention of the process of execution is quite different; it is given to compel the defendant to render that satisfaction to the plaintiff to which he is already entitled by the solemn adjudication of a court of justice, after all his objections have been heard and considered. By the common law, as well as by the statute 13 Ed. I. ch. 11, the sheriff is bound to keep a debtor arrested on process of execution.

It is not enough that he should be in safe, but he must be in close confinement, and it was formerly the duty and the practice of sheriffs, to carry the prisoner immediately after the arrest to the county gaol.—Plow. 35; Hobb. 202. Since Lord Hobart's time, the practice in this particular has been changed, and it is now usual for sheriffs in England to allow the debtor to remain in a lock-up house, closely confined, for some time before the return of the writ, and to take him to gaol after that time if the debt should not be paid.—4 Taunt. 608. The sheriff cannot by the strict rule of the common law receive the amount of debt and costs from the defendant, and discharge him before the plaintiff is satisfied.—14 East. 468. Lord Ellenborough in that case said, alluding to the sheriff, "he had strictly no authority "under the writ to deliver him (meaning the debtor), till the "plaintiff had received and accepted the satisfaction." After the sheriff has arrested a debtor on process of execution, it is his duty to place him in close confinement; and he cannot allow him even the indulgence of going about with a

follower.—1 Pract. Parl. 24. I think there is no doubt of the legal right of the creditor to insist upon the immediate and close confinement of the debtor, when he is arrested on process of execution as a means of recovering his debt, and as the highest remedy afforded by the law. This remedy is not to be modified by act of the legislature, unless it appears to be the clear intention of the law makers to do so. The case of *Evans v. Atkins*, 4 T. R. 555, is explanatory of this principle. That was an action of debt to recover a penalty of 50*l.* under 32 Geo. II. cap. 28, sec. 1, 4, 12. The declaration stated the plaintiff was arrested by the defendant, who was a sheriff's officer, on a *ca. sa.*, and carried to prison within twenty-four hours after the arrest, contrary to the provisions of the statute. The 1st section, among other things, enacts "That no sheriff, &c., shall at any time or "times hereafter convey or carry, or cause to be conveyed "or carried, any person or persons by him or them arrested, "or being in his or their custody by virtue or colour of any "action, writ, process, or attachment, to any town, &c., nor "shall carry any such person to any gaol or prison within "four-and-twenty hours from the time of such arrest, unless "such person shall refuse to be carried to some safe and "convenient dwelling-house," &c. For the plaintiff it was urged, that this was a remedial law, which the court would extend as far as the words would admit of for the liberty of the subject. It was passed to prevent oppressions in sheriff's officers, on those who are in their custody, and therefore it applies as strongly in principle to the case of arrests in execution as on mesne process; the words too are large enough to cover both. The court, however, considered, from the general provisions of the act as well as from the words themselves, that the legislature did not intend to include arrests on process of execution, but merely arrests on mesne process, and thereupon gave judgment for the defendant. So here, I think, the legislature did not intend to interfere with the common-law right of the creditor to place his debtor in close confinement after judgment, in order to compel payment; they deemed it expedient not to interpose for the mitigation of the established law till after

the incarceration of the debtor, upon the presumption, no doubt, that he possessed sufficient means to discharge the debt. The 1st section of the act gives the sheriff authority to allow a debtor the benefit of the limits, as in these words: "That after the establishment of such limits, it shall and  
" may be lawful for any debtor or debtors, confined or to be  
" confined in such gaols, to be or remain at any part or place  
" within such limits," &c. This section then proceeds to authorise the sheriff to take security for the limits, which he could not do without the aid of a new law. The 4th section then confers a right on the sheriff of suing on the security, in case the debtor depart from the limits without paying the debt; and the phraseology of this part of the statute affords another argument in favour of my present opinion, that the legislature intended to extend relief only to debtors within the walls of the prison. The words are the following: "That if any debtor or debtors, who may be confined in any  
" gaol within the province, and who may have given security  
" to entitle himself to the benefit of such limits, shall with-  
" draw or depart from or out of the said limits, it shall and  
" may be lawful for the sheriff, &c., to sue," &c. It may be said that notwithstanding the statute does not in express terms allow the sheriff to sue on any other security except such as may be given on behalf of a debtor confined in gaol, still as there are no words prohibiting an action on a security taken from a debtor, when first arrested and before he is confined in gaol, such action, by an equitable construction of the statute, may be brought. I must say I think otherwise. It is a clear case of *privilegius adversis* between debtor and creditor, and the law must be construed strictly against the sheriff in support of the legal remedy of the creditor.—Hob. 202. The taking of security in that way is of no service, for should the sheriff immediately afterwards place the debtor on the limits, I think such proceeding would constitute an escape, as being contrary to the words of the writ and not sanctioned by the act. I think the whole scope, tenor and words of the act sufficiently prove that the legislature left the creditor to pursue his common-law remedy without interruption, till the close confinement of his debtor in gaol



destroyed the presumption of his possession of sufficient property to satisfy the judgments. The statute then begins to act in his favour, and its words should then be construed liberally in extending relief. There is an obvious and vast difference, both in a moral and physical effect, between a mere arrest and an actual confinement in gaol, in compelling a debtor to satisfy his creditors; and most debtors would rather give up all their property than be compelled as prisoners to pass the threshold of a gaol. Hence arises the importance of sustaining the provisions of the common law, till the legislature deem it expedient to abrogate them by clear and specific enactments. The sheriff, in my opinion, was not legally authorised to take the bond which forms the subject of this suit. The next question is, could the facts of this case be legally given in evidence under the plea *non est factum*? It is my opinion they could. A special *non est factum* long since became obsolete, and is now wholly disused.—4 M. & S. 338. Under a general *non est factum*, a defendant at the trial may adduce evidence to prove, either that he never executed the deed, or that it is void *ab initio*—Com. Dig. Pleader, 2 W. 18; 2 Stran. 1104; 2 Will. 347; Lofft. 457; 4 M. & Sel. 338. The rule of law appears to be this: all matters which make a deed absolutely void may be given in evidence under *non est factum*; but those which make it voidable only must be pleaded, and the party must conclude *actio non*, &c.

It is also a general rule, that any illegality arising from the prohibitions of an act of parliament, as in the case of usury and gaming, must be specially pleaded, and cannot be given in evidence under *non est factum*; and the reason of this seems to be, that a statute of this kind is always construed by the court so as to make the deed not absolutely void, but only voidable.—5 Rep. 119; 1 Saunders, 295 and note; 1 Com. Dig.; and 2 W. 18. In the present case, I think the bond is a nullity by the statute 23 Henry VI. cap. 9; and that the statute respecting gaol limits in this province, before mentioned, does not extend to it. The sheriff, by taking the bond immediately after the arrest, without carrying the debtor to gaol, defeated a part of the creditor's

legal remedy for the recovery of his debt, which it is possible he might have received if the process of execution had been fully executed by the safe and close confinement of the debtor.

I am therefore of opinion the plaintiff is not entitled to a new trial.

MACAULAY, J., after stating the case.—In the consideration of this case on the present motion, the following points suggest themselves :

1st. Can the plaintiff sustain a verdict under the issue without suggesting any breach of the condition ; or may he after the verdict suggest the same, and assess damages under the statute 8 & 9 W. III., cap. 11, upon a future occasion.

2ndly. If so, is a bond and condition sufficient on the face thereof in point of certainty and form, to support the action.

3rdly, If so, is a bond or other security for the limits of the prison, executed after the arrest and before actual commitment to prison, void and liable to be defeated under the general issue ; or may it be shewn by the obligee, or assignee, that after its execution and without any enlargement of the prisoner, or delay amounting to an escape in law, the prisoner was duly placed upon the limits, whence he afterwards escaped, which is suggested to be the fact in the present instance.

1st point. There is no doubt that a bond to a sheriff may be declared upon as a single bond, without stating the condition or breach in the declaration.—Plow. 60 ; Cro. Jac. 286 ; 1 Cur. R. 554 ; 4 T. R. 505 ; 2 H. B. 418 : 2 Vent. 234. Carthew, 301. And it would seem proper to require breaches to be suggested before the trial of the issues, in order to prevent the necessity of going to a second jury.—2 Wil. 377 ; 5 T. R. 636, 538 ; 8 T. R. 126, 255. Yet the following cases establish that a judgment may be entered for the penalty as before the statute, but that it can only stand as a security for the damage sustained ; and that such judgment may be founded on a verdict for demurrer, since it is determined that breaches may be assigned after issue in fact as well as upon a judgment by *nil dicet* or demurrer.—3 M. & T.

60 ; 1 Cow. 357 ; 3 B. & P. 607 ; 5 East. 613, 550 ; 5 T. R. 533 ; 8 T. R. 255 ; 14 E. 401 ; 2 Saund. 186-7 ; 1 Saund. 15, 179.

Should the verdict therefore be set aside, it would be more conformable to modern usage, to require that breaches should be suggested before the next trial, especially since from some cases it might be considered indispensable.

2nd point. The provincial statute 2 Geo. IV. ch. 6, declares that it shall not be incumbent upon the sheriff to allow any debtor or debtors the use and benefit of the limits, unless he or they shall furnish good and satisfactory security that he or they will not at any time during his or their confinement go or remove beyond such established limits.

The act does not require a security by bond, although in analogy to the usual bail bond under 23 Henry IV. cap. 8, which using the term *obligation*, has been construed to require a bond, security or specialty of that description is usually a security, its legal qualification must be decided upon accordingly.—1 T. R. 418 ; 7 T. R. 108 ; 4 E. 568 ; 2 Saund. 60 (u), 155 (a).

Being authorised and only sustainable under the statute (for without the act it would be void, as being taken to indemnify against what would then be an escape), if the condition is void for uncertainty, the whole security I think fails, and the bond would not remain single as argued.—10 Co. 100 ; 3 Lev. 74 ; 1 Lord Raym. 353 ; 2 T. R. 575 ; 1 Stran. 399. And if on the face of the record it should appear void, the objection might be urged on demurrer or in arrest of judgment.—2 T. R. 575 ; 2 Bl. 951 ; 5 Co. 119. Or upon the plea of *non est factum*.—Plow, 657 ; 4 M. & S. 328. Or at *nisi prius*, did the objection not appear till the production of this bond was executed under circumstances that rendered it void *ab initio*, as by reason of its uncertainty, or its being taken contrary to law, and the like, the obligor may avail himself of the exception under the plea of *non est factum*. The necessity of pleading seems to be between those cases in which a bond is absolutely void in its incep-

tion, and others in which *prima facie* it is valid, and only voidable upon the exception of the party.—4 Pt. Star. Ev. 481; Plow. 66-7; 2 T. R. 575; 2 Bl. 955; 4 M. & S. 328; 3 Com. N. P. C. 181.

The validity of the security in point of form is therefore next to be considered. If the bond is so drawn as to include every obligation imposed by law, and to afford every defence given by it, it would not seem that the specific terms of it are material; a substantial compliance with the statute only is requisite.—9 East. 55; and cases cited Tidd. Prac. 223; Petersdoff on Bail, 208-9. There can be no objection to the obligatory part. Then as to the condition: it provides that if one of the obligors, Phillips, taken on a *ca. sa.* issued out of the District Court at Brockville, directed to obligee, should well and truly confine himself to the limits of the gaol of the district, &c. Now *id certum est, quod certum reddi potest*, and it might be shewn what *ca. sa.* is alluded to, by proof, that at the period only one *ca. sa.* had issued against Phillips, on which he had been arrested and was in custody when the bond was given. The identity of the writ is also assisted by the concluding part of the condition, in which it speaks of the consequences of Phillip's departing the limits without consent of the plaintiff, or without payment of the money due A. Boyce on the *ca. sa.* for which he was then confined. This, I think, clearly points out that Boyce was the plaintiff, in whose favour the *ca. sa.* has issued. The amount indorsed is not stated, but it is susceptible of proof by the production of the writ, &c. I think, therefore, the condition sufficiently points out upon what process the debtor, Phillips, was in custody, and under which he was to enjoy the limits.—4 Taunt. 555.

The only other objection is, that the condition omits the word "*not*" before the words "depart from off the limits," and it reads as if the bond was to be void if he should depart without consent of plaintiff, &c.

I believe the court may intend that the condition is, if he should depart the bond was not to be void, or would supply in construction the obvious omission of the word "*not*."—3 Str. N. P. C. 76; 3 More, 214; 1 More, 214, 311; 5 Taunt.



707, S. C. ; 2 Atkins, 32 ; 2 Mod. 285 ; 12 Mod. 153 ; 2 Ld. Raym. 1043 ; 11 Mod. 275 ; 3 East. 602 ; 2 B. & P. 444 ; Watson on Awards, 27-8 ; Sayer, 244. Considering the obvious object and intention of the parties, I think the condition sufficient, and that the word " not " should be implied in its construction, or such a construction and transposition of the language of the condition be adopted as shall sustain its import.

Then as to the 3rd point, whether a bond like the present, executed off the limits and before commitment to prison, be void and impeachable under the plea of *non est factum*. If void *ab initio* for such cause, I think advantage may be taken thereof under the plea *non est factum*.—4 M. & S. 323. And that it is not necessarily to be specially pleaded in avoidance.

It is the duty of the sheriff to commit to prison a party arrested on final process, and to keep him safely in close custody, till legally discharged, and if he allows his prisoner to go at large on bail after the arrest, it amounts to an escape. Watson Shf. 135 ; 4 T. R. 555 ; 4 Taunt. 608. But in this province the sheriff is authorised to allow debtors the benefit of the limits, without incurring an escape.

It is, however, the duty of the sheriff to place his prisoner within those limits promptly ; if he do not, he may become liable for an escape. The limits when allowed constitute the prison, and the debtor while confined within their bounds is in legal custody.

Although the sheriff is to commit promptly, still it is always a question in a peculiar case, whether any delay or deviation amounts to an escape. If he can accept a bond for the limits before the commitment of the prisoner, I do not think that a delay reasonably sufficient to procure and execute such security, in the vicinity of the prisoner's residence, made solely for that purpose, would constitute an escape in law. As far as the practice of taking bail to the sheriff under mesne process extends, it seems that it is not absolutely necessary that the debtor should be under actual arrest at the execution of the bond. It may be given before, and in order to dispense with the necessity of a formal cap-

tion.—1 Str. 444, 643; 8 T. R. 187; 2 Saund. 60 (n). So by parity of reasoning, it would not seem incompetent to the sheriff to accept a bond for the limits after the arrest and before actual imprisonment, within the walls of the gaol or within the limits themselves, in order to prevent the necessity of so unpleasant a step (when it can be avoided) as actual commitment to close confinement; and it might happen that amongst his neighbours, at the period of arrest, the party might with much greater facility procure ample sureties than when removed to and shut up in the gaol. The operation of the bond might be prospective. If a bond might be taken for ease and favour, under colour and collusively, of course such instrument could not be enforced. The provincial act 2 Geo. IV. cap. 6, recites the expediency of gaol limits in which debtors might have the benefit of exercise and the open air, without subjecting the sheriff to an escape, and enacts that after their establishment it should be lawful for any debtor, confined or to be confined in such gaols, to be and remain at any part or place within such limits, without subjecting the sheriff to an escape, &c. It would appear from the above, that if a sheriff was disposed to grant the indulgence of the limits upon his own responsibility, he might do so by placing the debtor upon them without previously actually confining him in gaol. For all purposes of the arrest, the limits constitute the gaol; but if the sheriff did not place him upon the limits as promptly as he would be obliged to commit him to gaol before the establishment of limits, he would in like manner be guilty of an escape. But the sheriff is not constrained to grant the limits without security. The act provides, that it should not be incumbent on the sheriff to allow any debtor the use and benefit thereof unless such debtor should furnish good and satisfactory security, that he would not at any time during his confinement go or remain beyond the same. This language does not seem to me to exclude the right of the sheriff to accept such security, upon the arrest. The condition is to be, that the debtor will not go or remain beyond the limits during his confinement; of course, therefore, the security would only come into operation from the period of such confine-

ment, if not commenced at its execution. The confinement would consist in the sheriff placing the party upon the limits; and if he failed to do so promptly, whether with or without security, the delay or other irregularity would constitute an escape, for which he would become liable to the creditor. In like manner, after allowing the limits without security, the sheriff might exact and receive such security while the debtor remained therein, without placing him in close custody. It appears to me the present bond might have been taken under the circumstances supposed and suggested.

It does not recite that the debtor was presently in gaol or upon the limits, but that he had been taken on a *ca. sa.*, and the presumption on the face of the condition is, that he was in custody under it, though not in gaol. The condition then proceeds to say, if the debtor taken on a *ca. sa.* should well and truly confine himself to the limits of the Johnstown gaol, and should not depart from off the same without consent of plaintiff, or without payment, &c., the bond should be void.

It would be for the sheriff to shew, as a preliminary step to the operation of such bond, that the debtor was afterwards confined to the limits. The fact is not asserted in the condition, but might be proved. From that period the security would obtain in full force. As I am of opinion, therefore, that the bond is not void from the mere circumstance of being taken off the limits before commitment to prison, and as it is suggested, that in point of fact it can be proved the debtor was promptly placed therein conformable to the duties of the sheriff, I have no objection to set aside the verdict on payment of costs, with leave to the plaintiff to amend the roll by suggesting breaches either in the declaration or after the similiter, in which suggestion the fact of the debtor having been duly placed upon the limits by the obligee or his authorised deputy or bailiff after the execution of the bond, should be inserted.

I make the payment of costs a condition, because the plaintiff did not at the former trial offer the proof on this head with which he says he was or can be prepared.

I do not think the subsequent parts of the Gaol Limits

Act impugn the construction I have put upon the first claim. The whole must be taken together.

I have looked to the general object and tenor of the act. I have taken it altogether, in conjunction with the other legislative provisions which subsist in this particular, on the subject of arrest on civil process. I find the right to arrest prohibited in all cases before judgment, unless upon an apprehension of the debtor's flight from the province, vouched by affidavit. I find the same rule extended to final process, unless in the excepted case of a fraudulent and secret conveyance of debtor's property. After arrest on mesne process, bail is of right; after final process, the indulgence of bail for a limited enlargement is authorised. The security of the debtor, or ample bail in the event of his absconding, is the leading object; the payment of the debt by means of the compulsory nature of the restraint on final process, is another object. But whatever compulsory effect such process is designed or expected to have, it seems to me the legislature considered it might be attained by restricting the party to the limits on bail, without actually immuring him in prison. I have not dwelt upon the verbal criticism to which the Gaol Limits Act might be subjected. One object is recited to be, the affording of an area around each gaol, in which debtors might have the benefit of exercise and air. It is declared lawful for prisoners confined, or to be confined in gaols, to be within any part of the limits without being guilty of an escape. The term confined *may* embrace those in custody upon the passing of the act. The term *to be confined* in such gaols may receive a double interpretation.

1st. That none but such as shall be first actually confined in gaol shall be entitled to the limits; or, 2ndly, That such as may be arrested upon *ca. sa.*, and who in the ordinary course of the sheriff's duty are to be confined in gaol (for of debtors who are arrested upon *ca. sa.* it may be predicted that they are to be confined in gaol), may be and remain within any part of the limits. They were not confined to gaol when the act passed; but being afterwards arrested on final process, it might well be said of them, in framing an act to have prospective operation, that they were to be con-



fined, and described them as persons to be confined in gaol. The act does not say, to be hereafter confined or actually confined closely, or being first confined. The passage is merely descriptive of the persons entitled to the limits, viz., those debtors already confined, or to be confined, in such gaols; in other words, all debtors in execution. All debtors were not debtors confined to gaol, but such only as should be arrested on *ca. sa.*, and when arrested they would be confined to gaol, unless allowed the limits by the sheriff.

The proviso in the first clause, as already noticed, contains no ambiguous restriction, and aids, I think, the construction I have adopted. The only other equivocal passage is the beginning of the second section, authorising the sheriff to sue and recover upon the securities given for the limits. It enacts, that "if any debtor or debtors who may be confined in any gaol within the province, and who may have given security to entitle himself or themselves to the benefit of such limits, shall withdraw or depart, &c., the sheriff, &c., may recover the sum for which such debtor may have been confined in such gaol or limits." Now the term "*who may be confined in any gaol*," as here used, is susceptible of a double interpretation, as in the former clause. The legislature anticipated the *actual imprisonment* of most debtors arrested on *ca. sa.*, and provided for them in general terms, without adverting to peculiar cases; but a *case within the spirit*, though not the letter, of an act of this kind, may in construction be properly held to be embraced. Besides, if the necessity of an actual incarceration in the gaol before an allowance of the limits were acceded, it would not follow that a security for their enjoyment might not be validly executed upon the arrest and before imprisonment. If in point of law an actual commitment within the walls of the gaol should necessarily precede the indulgence of the limits, it may be asked how long such coercive confinement should continue, in order to ascertain its effect. If a minute be admitted as sufficient time, the step would appear nugatory and little more than an idle ceremony. The debtor would *pro forma* be obliged to enter the debtor's room and execute his bond there, or walk through the hall of the prison, to comply with the

literal exigency of the statute. I cannot believe that any repugnance to conform to this ceremony would compel an able but unwilling debtor to pay his debt in order to avoid it, and who would, rather than pay, willingly endure the irksome restraint of the limits, and solicit the intercession of his friends to obtain it by joining in securities to the sheriff. And even if such an effect might possibly be produced in some particular cases, I do not think the anticipation of it entered at all into the minds of the legislature, in providing the gaol limits; and it seems to me, the exaction of such a mere formal and momentary imprisonment, if regarded as a degradation, is only calculated to injure the feelings of most debtors unfortunate enough to be arrested upon a *ca. sa.*; for I am convinced that in a great majority of cases, an inability, rather than an unwillingness to pay, occasions the necessity of resort to such process, and I cannot but regard the disgrace of actual commitment in gaol, if it be one, as irreconcilable with the benevolent intentions of the legislature in providing the relief afforded by the act under consideration.

I cannot admit the force of any reason I have heard, why the debtor should not be at once placed on the limits, without passing through the prison walls. The coercive effect of such a step seems to be in opposition to the benign intentions and spirit of the act, and of the general laws of imprisonment for debt subsisting in this province. In addition to all which, the view I entertain is supported by the well established principle, that where prison rules or gaol limits are allowed and established, such rules or limits constitute to all purposes of process on execution, the prison or gaol.—See 8 & 9 W. III. c. 27; Strange 1122; Hardress, 33-4; 2 D. & R. 711; 2 Arch. Practice, 130; 1 Grades K. B. 397, &c.

*Per Cur.*—Rule discharged.

## KING'S BENCH.

EASTER TERM, 2 WILL. IV.

## DOE DEM. HENNESY V. MYERS.

A nominee of the Crown, before the issuing of letters patent, makes a conveyance in fee to one person. He afterwards obtains a patent granting the estate to himself, and then conveys it to another; who again conveys. *Held*, that the patentee of the Crown, and his assigns as privies in estate, are estopped by the first conveyance; and that the patent feeds the estoppel, and makes it a vested interest and estate. *Also held*, that the Register Act does not apply unless when a memorial of a conveyance of the same land has been previously registered.

One Abbott was the original nominee of the crown of the lands sought to be recovered in this action. On the fourth day of May, 1804, he bargained and sold the premises to one Hennesy and Sarah his wife, by an instrument in writing, which is in part as follows: "The said Abbott gives, "conveys and confirms, the premises to Hennesy during his "life, and after his decease to his wife, Sarah, her heirs and "assigns for ever, in consideration that the said Hennesy and "his wife do take good care of the said Abbott, and provide "for him decent clothing, meat, drink, and washing and "lodging, during the said Abbott's life; and at his death to "give the said Abbott a decent burial." After the execution of this instrument, on the 24th of March, 1809, the patent from the crown, granting the premises to Abbott in fee, issued; and on the 6th day of June, in the same year, Abbott, by a deed poll, made another conveyance of the premises to Elizabeth, wife of Daniel McKenzie, in fee, and thereby acknowledged the receipt of 100*l.* as the consideration of the sale. The deed to Elizabeth McKenzie, was registered on the twelfth day of June, 1809, and the deed to Hennesy and wife was registered on the 14th of August, 1811. The lessor of the plaintiff Hennesy went into possession of the premises on the 4th of May, 1804, when he received the first deed from Abbott, and continued in possession more than twenty years, and then an action of ejectment was brought by McKenzie

and wife, to recover possession under their deed. This action was not defended, owing, as it was alleged, to the misapprehension of Hennesy, who supposed he might appear at the assizes and contest the action without any preliminary steps for his defence. McKenzie and wife signed judgment against the casual ejector, and by writ of possession turned the lessor of the plaintiff in the present action out of possession, and then conveyed the premises to the defendant by indenture of bargain and sale, which was also registered. The defendant took possession under that conveyance, and the present action is brought by Hennesy to regain the possession as tenant for life, under the deed from Abbott to Hennesy and his wife, above mentioned.

At the trial of this cause at the assizes for the District of Newcastle, the jury gave a verdict for the lessor of the plaintiff; and leave was given to move to set it aside and enter a nonsuit.

In Michaelmas term last, the *Solicitor-General* obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the verdict was against evidence. The *Solicitor-General*, on moving for the rule, stated three objections to the title of the lessor.

First, that until the time of the issuing the patent, Abbott had no title in himself, and consequently could not convey any to the lessor of the plaintiff; secondly, that the deed to the lessor of the plaintiff was upon condition of maintaining the grantor—the words “in consideration,” &c., amounting to a condition, and which condition was broken; and thirdly, the deed from the grantor, Abbott, to the lessor of the plaintiff, was not registered until after the registry of the deed to McKenzie and wife.

In Hilary term, *Sullivan*, for the lessor of the plaintiff, shewed cause.

Admitting, for the sake of argument, that before the issuing the patent there was no title in Abbott, and that as against a stranger to his title his conveyance could not be held to avail, yet numberless authorities go clearly to establish the principle, that a man who makes a deed is estopped for ever afterwards to deny that he had authority and power



to do what by that deed he professes to do effectually. And the law is equally clear, that when a party to a deed is estopped by it, all his privies in estate, such as his heirs, executors, administrators, or assigns, according as the estate is real or personal, are also bound by the estoppel. The authorities go still further, even to this extent: that when a party makes a conveyance, having at the time no title, but afterwards acquires one, that then the estate subsequently acquired is actually conveyed by the estoppel; and not only are the party and privies connected with the conveyance bound, but strangers to the title: the conveyance in the first instance, and the estoppel arising from it, together with the subsequent estate acquired, operating together to make a perfect title against all who cannot shew an independent right in themselves.—See Holt's Rep. 174; 12 Mod. 397. If A. covenant with B. to convey him all his right, he is estopped from saying that he had none.—Littleton Sect. 58; Co. Lit. 47 (b). If a lease be made by deed, then are both parties concluded.—Fitzherbert N. B. 142; Co. Lit. 352 (b). "Every estoppel ought to be reciprocal, that is, to bind both parties, and this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel; privies in blood as the heir, privies in estate as the *feoffee* *lessee*, and others that come in by act of law, or in the post, shall be bound and take advantage of the estoppel."—Hob. 337-338. A feoffment bars all *present* and *future rights*.—V. et Co. R. 53. Parties and privies are bound by estoppel.—Dyer, 256; Plow, 344; Co. Lit. 47. If a lessor, at the time of making the lease, hath nothing in the land, but afterwards get it by purchase, this is a good lease by estoppel.—2 Bl. 355. "For the act of the ancestor shall bind the heir, and the act of the principal his substitute, or such as claim under him by any subsequent assignment." See also Arch. Pl. and Ev. 200, and the authorities there cited, which clearly shew that the assignee is a privy in estate, who is bound by the estoppel as coming in in the post.—1 Salk. 276; 2 Taunt. Com. Dig. Estoppel A. B., in which a number of cases to the same point are cited.—Cro. El. 700; R. Pol. 61-66. If the eldest son of tenant in tail levy a fine, and

then his father dies, and afterwards he dies without issue, his younger brother shall be estopped by the fine, for he must derive his title as heir at law to his brother. "An estoppel binds, even though there were no interest at the time of the estoppel created, but the interest afterwards accrued to the ancestor." "So a privy in estate is bound, as if A. demises the manor of D., and afterwards purchases the manor and sells it to B.; B. is estopped."—1 Salk. 276; 1 Ld. Raym. 729. "But when an estoppel binds the estate and converts it to an interest, the court will adjudge accordingly, as if A leases land to B. in which he hath nothing, and then purchases a lease of the land for 21 years, and afterwards leases the land to C. for 10 years, and all this is found by verdict, the court will adjudge the title good by the estoppel."—1 Salk. 276.

But the nominee of the crown has by no means the mere naked possession which is contended for by the defendant. The provincial statutes commonly called the Heir and Devisee Acts, 45 Geo. III. cap. 2, 48 Geo. III. cap 10, 52 Geo. III. cap. 9, 56 Geo. III. cap. 21, 59 Geo. III. cap. 18, 4 Geo. IV. cap. 7, plainly recognize an estate in the nominee of the crown, a kind of conditional fee, to be absolute when the settlement duties and other requisites are done and performed. Without these statutes, it might be said that this title is at best an equitable one, which can only be taken notice of in a Court of Chancery; but these statutes recognizing such an estate, make it imperative on the courts of law to notice it, as part of the common law of the land. This estate is so far taken notice of, that a proviso is thought necessary to prevent the issuing of the patents from invalidatory mortgages and other incumbrances created previously, as the patent issuing under the directions of a statute might be held to do unless provided against. If the nominee of the crown have no title, how can he mortgage? but the law recognizes a title from him by mortgage, therefore he has a title which is a fee simple, if any thing, and which he may get solemnly confirmed by letters patent.

As to the point raised, that this deed or instrument is conditional, it cannot require much argument to repel such

a notion. The words of the instrument merely import, that the consideration is a contract on the part of the assignee, to be performed *in futuro*; but there is not one word to shew that it is intended by the parties as a condition. Unless a condition be clearly and unequivocally stated, the court will intend as much as possible against it, as construction of law is always if possible against a forfeiture. Justice is evidently on the side of this view of the law. As in the present case; if the assignor of the land were to shew that one meal had been refused or neglected to be supplied to him, it would be a forfeiture of the land. Abbott in this case had his action, if there was any breach of the contract.—Rolle's Ab. 407; Co. Lit. 204; 4 Leo. 2; Rolle's Ab. 413-14; 7 Petersdorff ab. 73; 2 Mod. 34; 1 Meeson, 414; in which the judgment of Lord Hale is directly in point. Where the words are—"the lessee paying all the rents," or "so long as the lessee shall pay the rents," nonpayment would not defeat the lease, for then upon every breach of covenant a lease would be void.—2 Mod. 34. The court took time to consider, and then said the covenant "paying all the rents," &c., was not a condition; for then, on a breach amounting to one penny, the party might lose an estate worth £1000.

This deed is good as a bargain and sale. It has a sufficient consideration, 221l. 2s. 3d.—2 Saund. 96-7; 10 Mod. 35; Willes, 683.

With respect to the priority of registry, there can be no doubt under the first clause of the Registry Act. No man is bound to place his land under the operation of the registry laws, unless a memorial has been already registered for the same land. It was intended by the act to leave it at the option of the owners of the land, whether to register or not, merely making it necessary to continue registering if a commencement be once made.

*Solicitor-General*, for the defendant.—Abbott had no estate in the premises in question, at the time of the deed made to Hennessy. The possession and title was in the crown, who could not be dispossessed by the act of a private individual. There was no possession in Abbott on which a release or bargain and sale could be founded; and the title in Hennessy can

only be sustained by implying a dispossession or disseisin against the king. The estoppel which is contended for would, if sustained, not only be held against the title of Abbott, but against the title of the crown; and how could Abbott, by any act of his, divest the title from the king, and convey the estate, which he had not himself, to a stranger. Suppose the patent never issued, it could not now be held that the fee of the land was vested in Hennesy; and surely the issuing of the patent, vesting the premises in Abbott, cannot help Hennesy's title. If a party were to make a deed, reciting that whereas I have the promise of the crown for a grant, and then were to make a conveyance, there is no doubt but the deed would be void. And the court are bound to take notice of the title of the king, who, as lord paramount, holds all the lands in the province, and whose title must be considered good until it is shewn that he has granted the estate to another. If the patent had issued to a stranger, and not to Abbott, it is not contended that it would have given Hennesy any title. And as the title of the estoppel is of no consequence; as though the defendant may be estopped to allege title out of himself at the time of the first conveyance executed, the court cannot be estopped to notice the fact of the title having been in the crown. Besides, it is argued that the defendant being privy to the title in Abbott, cannot object to it. But the same argument applies to the lessor of the plaintiff, as being privy and coming in in the post to the title of the crown, which he ought not to be allowed to deny, as the title of all the parties must depend upon it. Therefore, unless the lessor of the plaintiff can shew a grant previous to the deed made to him, his title must fail.

Setting aside the question of estoppel, which is founded on old, ill-understood, and almost obsolete cases, there can be nothing plainer than the want of title in the lessor of the plaintiff.—See *Shepherd's Touch.* 21. The doctrine that a freehold *in futuro*, or to arise to the grantor after the conveyance, cannot be passed by feoffment; and there is no reason why this instrument should have a larger operation,



particularly as there is no vested estate, as there is in a reversion of a remainder.

The deed is very imperfectly drawn, but the intention of the parties is very apparent. The lessor of the plaintiff was to have the land in consideration that *he would* find board, &c., for the grantor, and not in consideration of his having contracted to do so. On his not providing for the grantor as mentioned in the deed, the consideration failed; and the deed lost one of the great essentials of a bargain and sale, namely, a valuable consideration. The estate conveyed, therefore, seems to be the base or conditional fee, which is at at an end on the condition being broken.

It is argued that the registry law does not apply, in consequence of there being no memorial registered. It cannot be supposed that the legislature intended the law to have the partial operation intended, for such a construction would open a door to fraud, and deprive the country of many of the benefits of the Registry Act. No person can discover, from the examination of the registry office, whether there may not have been a conveyance previous to the first on record, and thus all confidence in title would be destroyed. The plaintiff's counsel is inconsistent in his argument; he wishes at one time to estop us to say that the title was in the crown, and then he wishes the fact to be noticed for the purpose of avoiding the operation of the Registry Act. If the estoppel contended for be allowed, it must bind both parties; and if so, how is it shewn that the deed from Abbott was the first, or that there were none other registered. The presumption of law (if the facts are prevented from being considered by the estoppel) must be in favor of the operation of the Registry Act, and not against it; and it ought to have been proved that there were no previously registered deeds.

Judgment was given in this term.

ROBINSON, C. J. (after stating the case).—A new trial is moved for, on the ground that Abbott, having no title when he conveyed to Hennesy and wife, the letters patent not having issued till afterwards, his deed to Hennesy and wife was void; and it was further insisted on, that the deed to Elizabeth McKenzie, having been registered in 1809, and

the deed to Hennesy and wife not registered till 1811, the latter must be considered fraudulent and void, under the provisions of the Register Act.

With respect to this point, it is not one on which an argument can be maintained. It has been several times discussed in this court, in other cases. The words of the Registry Act are too plain to admit of doubt.

The effect of that statute, where it applies, is to render a prior deed, however fairly made, absolutely void as against a subsequent deed first registered; a provision without which due effect could not be given to the act, but which nevertheless operates very hardly in many cases, by producing the loss of an estate honourably acquired.

We cannot extend the application of so penal a provision beyond the letter, and certainly not *against* the letter. Now it is as plain as day, that the second clause of our Registry Act is so framed as to prevent the first registry of a deed respecting premises which have never before been made the subject of an entry in the county register, having the effect of rendering invalid a prior bona fide deed. A commencement must have been first made; the title to any particular estate must have first become "a *registered title*," and then the priority of registration decides the preference, as between deeds subsequently given. In this respect our statute closely follows the English registry acts, and the reason for placing things on that footing is obvious. Inasmuch, therefore, as no memorial had been registered affecting this land, at the time that the deed to Hennesy was given, his deed is not liable to be postponed to McKenzie's by reason of the prior registry of the latter.

With respect to the principal question in this case, I am of opinion that the plaintiff was rightly allowed to recover at *nisi prius*. The general principle is clear, that if a man convey to another an estate to which he has at the time no title, the vendee can nevertheless maintain his possession against the vendor, or his heirs or assigns; for the vendor is estopped by his own deed from alleging that he had no title at the time he conveyed, his heirs are estopped as being privies in blood, and his assigns as privies in estate.

The estoppel operates by conclusion; and if after such conveyance the vendor acquires a title, such title serves "*to feed the estoppel*," which, from thenceforth, is more than a mere estoppel by conclusion—it is a title by estoppel.—6 Mod. 258. It runs with the land, and, as it is said, works in interest. If, indeed, the deed upon which it is contended the estoppel arises, had shewn upon the face of it that Abbott had no title, he would not have been estopped, because the truth would have appeared on the whole instrument.—Dyer, 244. That, however, is not the case here; and the only consideration, as it appears to me, is whether the king's patent having issued to Abbott in 1809, can establish anything to the prejudice of Hennesy. I am of opinion it cannot. It is a fact in his favour; being a title to Abbott, from whom he took it, gives him a title by estoppel working in interest, instead of being an estoppel by conclusion.

It does not in my opinion estop Hennesy from shewing that the king had no estate at the time he made the patent, for that may be tried in an issue upon *non concessit*.—Eden's case, 6 Co.; Hyndes' Case, 4 Co., 71. Much less does it establish by estoppel, that the king and not Abbott was seized in 1804, when the deed to Hennesy was made, for it is perfectly consistent with the patent, that Abbott might then have been seized.—Roll. Ab. 871. Might not the king have granted before 1804, and afterwards become vested with the estate by inquisition for defect of heirs? might not he have granted to Abbott before 1804, and afterwards taken the estate by surrender.

It may be urged, that Abbott's acceptance of the patent in 1809, estops him and his assigns from denying that the king then first granted him the land; and that the presumption must be, that till that period the title had always been in the king. I find nothing to satisfy me, however, that we are warranted in holding this doctrine; and certainly, if acceptance of the patent by Abbott is necessary to render it an estoppel upon him or his assigns, it would be extraordinary that this principle should be extended to any other than his subsequent assigns, that is, to those who should derive through him *under* this patent. To carry the estoppel

back to persons who *were* his assignees before this patent issued, would be to enable Abbott to exercise his will in accepting or not accepting a patient, in such a manner as to defeat a former purchaser from himself.

It is a consideration to be borne in mind, that the decision we are now making may tend to diminish the confidence attached to the possession of the king's grant, if a sale made before it issued can be thus held valid against a person purchasing under the patent; but we must also remember that the person buying from the original nominee of the crown, before the issuing of the patent, cannot be held unworthy of protection from his imprudence, because he buys that which the legislature in the several Heir and Devisee Acts has recognised as being a legitimate subject of assignment by sale or devise; not that these acts recognise such assignment as conveying a legal title, but as transferring an equitable claim to a patent.

In giving effect therefore, upon the doctrine of estoppel, to deeds bona fide made before the patent issues, we are carrying into effect a principle which as a general rule is extremely just, and I do not see any ground in law or reason for denying the operation of that principle in such cases as that before us.

SHERWOOD, J.—It is upon the title said to be created by the deed from Abbott to Hennesy that this present action turns, and I will first consider the objections to it, and then the nature of the instrument itself. The two following objections were made in argument in support of the defendant's claim:—1st. Abbott was not in possession of the premises when he conveyed to Hennesy and wife. 2ndly. The deed to Elizabeth McKenzie was registered first. The counsel for the defendant insisted that the king was in possession when Abbott conveyed to Hennesy and wife. In support of this position, he advanced it is a legal principle “that the king cannot be dispossessed by the act of a private individual.” But it appears to me that there is no legal axiom to that extent. The long established practice of filing informations on the part of the crown for intrusion, clearly shews that the king can be dispossessed; for such informa-



tions are in the nature of action *quare clausum fregit*, and the judgment for the king is, that the defendant "*amovetur de possessione*."—Com. Dig. Title Prerogative, D. 77. In the case of Taylor ex dem. Atkins v. Horde et al., 1 Bur. 98. Lord Mansfield said, nobody can disseize the king, neither can any one be disseized to the use of the king. The king may be wrongfully dispossessed, but the intruder's injurious possession is "*sine aliquo vestimento*," and called intrusion. The statute 21 Jas. I. ch. 14, enacts that whenever the king shall be out of possession for 20 years or more, the defendant may plead the general issue, and shall not be compelled to plead specially, and that in such case the defendant shall retain his possession till the title be adjudged for the king. From these authorities, I think it quite clear that the king may be out of possession of his own lands, and that the possession may be in a private individual who has no legal title, and who has taken the possession wrongfully. I consider, however, that the possession of Abbott was rightful. He was the nominee of the crown, and assumed and held the possession by the express assent of the crown, for the purpose of receiving a grant afterwards at the convenience of the government. This is a possession *cum assensu regis*, and amounts to an equitable right, because the faith of government is pledged and ought always to be redeemed. The legislature have noticed and recognized the nominee of the crown as the owner of the soil in equity and good conscience, by many temporary laws confirmatory of such equitable right to the property not only of himself, but of his heirs, devisees, or assignees, and thereby proving beyond a possibility of a doubt the legality of his possession.

With respect to the second objection, that the deed to Elizabeth McKenzie was registered first, I think it cannot avail in this case. By the provisions of the common law, no conveyances were required to be registered, and generally speaking, they could be made by parol and livery of seisin, but they were most frequently made by writing; and livery of seisin was always the operative and essential part of the conveyance when the entire estate in the land was to be passed. Equitable estates of freehold could always have

been created by the common law, through the medium of trusts; and when the Statute of Uses, 27 Henry VIII. chap. 10, transferred uses into possession, legal estates could have been created in the same manner. Immediately after the passing of that act, it was discovered that great inconvenience would follow a mode of conveyance so very uncertain in the proof, and so liable to abuse by secret arrangements to suit individual interests; and the statute 27 Henry VIII. chap. 16, was passed to remedy the evil by which it was declared that no estate of freehold should pass by bargain and sale only, unless it were by indenture enrolled according to the directions of that act. That law was deemed an extensive improvement in the legal transmissions of real property, and so it was when compared with the mode in use among our illiterate ancestors, whose wants were almost wholly limited to the feudal investiture, the sole design of which was to give notice of the translation of the feud from one tenant to another, so that the lord might not be at a loss to know from whom to demand his services. When England became more commercial, the transfer of real property became more frequent, either for the purpose of actual sale or by way of security for monies to be employed in private enterprise. Offices for the registry of deeds were established in many parts of the kingdom; and register offices have also been established in this province by the 35 Geo. III. chap. 5. The registry of deeds is not compulsory by this act; the parties may register them or not, at their election. In the present case, the deed to Elizabeth McKenzie was registered before the deed of the lessor of the plaintiff, although the latter deed was executed several years before the former. Still the deed to Elizabeth McKenzie acquired no priority by being registered first, because Abbott did not hold the land by a registered title, but by grant immediately from the crown. The discriminatory powers of the registry law are not brought into operation till a memorial has been registered; for the law will not presume the purchaser had notice before the completion of the statutory enrolment, which is entered in a public office, to which every one has free access. A perusal of the registered memorial will shew

the names of vendor and vendee, and of the witnesses, together with the nature and extent of the estate created by the deed to which the registry relates. When a memorial has been entered and registered in a public office in this manner, no one who afterwards buys the land can be sure of a legal title, unless he causes a memorial of it to be registered in the same way ; because the act expressly requires him to do so, under the penalty of a loss of the property in case the vendor should give a conveyance for a valuable consideration to a second purchaser, who causes a memorial of it to be registered before the memorial of the other deed is registered.

This part of the Registry Act appears at first view to be a harsh enactment; but when its beneficial effects are developed, that unfavourable impression is entirely effaced. The provisions of the statute strike at the root of those numerous evils which secret, fraudulent and successive conveyances of the same lands by the same vendor have always produced in the community, and prevents the possibility of their occurrence. All this is done by adopting the common law maxim of "caveat emptor," which in this instance may be translated "let the purchaser be on his guard and register his deed."

I have already said, however, that in my opinion the Register Act is not applicable to the case ; and the next question therefore arises on the validity of the deed from Abbott to the lessor of the plaintiff. If it were sufficient to convey the freehold at its inception, it must still be capable of supporting the estate. There can be no doubt the grantor intended to convey the estate of freehold, and the grantees intended to receive it ; and if the deed can be classed under any legal mode or form of conveyance in order to effectuate the desired end, it should be, notwithstanding the parties themselves originally designed it to range under another mode. In *Goodtitle v. Baily*, Cowp. 601, it was said by the court, "the rules laid down with respect to the construction of deeds are founded in laws based on common sense ; they shall operate according to the intention of the parties, if by law they may." If the deed now under consideration, can have a legal operation to convey an estate of freehold, it must enure as a bargain and sale, or as a feoffment ; for I think

it cannot assume any other technical character. I do not now allude to the question of estoppel. I intend to examine that afterwards. No person at common law could be seized in fee to the use of another, if he had not himself an estate in fee. And as a bargain and sale, by the statute of uses, only transfers such uses into possession as actually exist when the conveyance is executed, it follows as a legal consequence, that when the vendor has not a fee simple, the vendee cannot acquire such an estate by the deed. And I think this principle is in effect established by the following authorities.—2 Inst. 671 ; 10 Co. 98 ; Dyer, 309 ; Cro. El. 401. In my opinion, a bargain and sale conveys no greater estate than the bargainor had at the delivery of the deed. And as Abbott had no legal estate when he executed the deed, the lessor of the plaintiff did not thereby acquire any legal freehold or estate in the premises, if the deed be considered as a bargain and sale only.

I will now endeavour to ascertain whether the deed can enure as a feoffment ; and if it can, then whether it passed an estate of fee simple to the lessor of the plaintiff.

The words in the deed appear sufficient to constitute a feoffment ; for any words which shew the intention of the one party to convey, and of the other to accept an estate, are available to transfer the property—1 Vent. 138 ; 2 Wils. 78 ; Cow. 601—if all other legal requisites are present. To make a valid feoffment, livery of seisin is indispensably necessary. It may be established in two ways ; either by proof of its existence in fact, or by legal presumption, under certain circumstances. No livery in fact was proved in this case, but an adverse possession ; for I am not aware at this time of any authority to shew that adverse possession for a less period than twenty years will raise a legal presumption of livery. The following authorities establish that a possession for twenty years will have that effect.—Bac. Ab. Title Evidence, 648 ; Prest. Conv. 305 & 309 , and Wightwick, 123. The evidence given at the trial established a possession in the lessor of the plaintiff for more than 20 years after the date of the deed from Abbott to him, and before McKenzie and wife turned him out of possession by the



action of ejectment already mentioned. The possession which intervened between the date of the deed and the grant from the crown, cannot raise a presumption of *seisin pro tanto*, because the king was all that time seized of the estate himself; and between the issuing of the king's grant and the ejectment there were not twenty years. Had the deed from the crown been perfected twenty years before the ejectment, then the adverse possession for twenty years following would have created in the lessor of the plaintiff a right of entry, upon which he might have sustained this action, under the Statute of Limitations.—21 Jac. 1, ch. 16, s. 1. Which operates in such a case to the same extent as a descent to the heir of a disseisor, abator, or intruder. By the ancient doctrine, that "*nullum tempus occurrit regi*," the king is not bound by that statute, and therefore the time of possession before the king's grant cannot be taken into account, either to raise a presumption of livery or to debar the plaintiff's right of entry. If the lessor of the plaintiff had in fact twenty year's possession, which I think has not been established, because the king was in possession till the patent issued, still it remains to be considered whether the deed created any estate of freehold in the plaintiff's lessor. It was admitted by the counsel on both sides, that when Abbott executed the deed, the fee simple of the premises was in the crown, and continued so till the king's patent issued to Abbott, on the 24th March, 1809, nearly five years afterwards. In Cruise on Real Property, Title *Deed*, vol. 4, page 108, the following remarks are found on the nature and efficiency of deeds of feoffment:—"The next singular and powerful effect of a feoffment is, that it operates on the possession without any regard to the estate or interest of the feoffer, so that to make a feoffment good and valid, nothing is wanting but possession." Thus Littleton says, "that if tenant for life or years make a feoffment in fee with livery of seisin, it will give an estate in fee, and operate as a disseisin of the real owner." An actual disseisin of the rightful owner is effected by such a feoffment in ordinary cases; and this is the reason, in my opinion, why the feoffee acquires a freehold in law: and where there is no

disseisin, I think it follows, no freehold estate is created by the feoffment. When Abbott executed the deed, the king was the legal owner of the premises; but no one can disseise the king, and therefore the lessor of the plaintiff gained no estate of freehold by disseisin, even if livery could be presumed. As livery of seisin, however, cannot be presumed in this case, for want of evidence of twenty years adverse possession, the lessor of the plaintiff could not have acquired any estate but an estate at will, even supposing Abbott to have been the owner in fee; but as the king was the owner, the lessor of the plaintiff acquired no legal estate whatever under the conveyance from Abbott, the nominee of the crown. The deed, therefore, would be equally inoperative if considered a feoffment as if considered a bargain and sale.

I now come to the subject of estoppel. The doctrine of estoppels, which work upon the estate and form a title to lands of which the vendor was not the legal owner when the deed to the vendor was executed, is not often examined in this province, because a necessity for such a step very unfrequently occurs. The legislature has at different periods enacted laws, by which an opportunity is afforded to many of converting equitable into legal estates; and it is not unworthy of remark, that every one of these enactments either expressly or impliedly recognizes the fee simple of all lands in this province to be in the crown anterior to the issuing of the king's patent. It seems to me, however, the court is bound to take judicial notice of that fact, independently of the provincial enactments. That the king is lord paramount of all the lands, is an elementary principle of the constitution.—Co. Lit. 1 B.; Plow. 498. Lord Coke says, "estoppels are a curious kind of learning;" and whoever examines the law on this subject must admit the truth of his remarks. He will find many nice and subtle distinctions for which it is quite impossible to give any satisfactory reason. The doctrine of estoppels seems to be founded in some degree on the maxim "*nemo allegans suam turpitudinem audiendus est.*" It would be improper for any one to do a solemn act affecting the interest of another, and afterwards say he had no right to do it; and therefore the

law is stated in Co. Lit. 352 a, to be "that a man's own act or acceptance stoppeth or closeth up his mouth to speak the truth." No one should allege any thing but the truth; and what he has once alleged in a premeditated manner, according to technical forms long established, he shall not be at liberty to repudiate by a subsequent allegation. The law allows some evidence to be of so high and conclusive a nature as to admit of no contradictory proof; and this is applicable, as a general rule, to all deeds of indenture, and to such contracts under seal as are executed by both parties, so long as the interests of the parties themselves and their privies are in question. A stranger to the deed is beyond the influence of this principle, and if he does not become a privy in estate afterwards, he cannot be effected by the conveyance. In the present case, it is not only necessary to examine the law of estoppels, but also the law relative to privies in estate; because it will be found they are intimately connected, and have a material bearing on each other. If a man make a lease of lands for years by indenture to B., and both parties execute the deed, they are both bound; and A. cannot say he had no estate in the lands, nor can B. say so as long as he claims title and holds under A. The allegations may in fact be strictly true: but the law considers the acts of the parties themselves as the best possible evidence, and therefore generally speaking will admit of no other. Both parties being reciprocally bound by such evidence, their assigns by legal consequence are equally bound, and this the law terms an estoppel. The grantor, the grantee, and all privies in blood, in estate and in law, of both parties, come within the scope and meaning of the rule. They are subject to all the advantages and disadvantages incident by law to the nature of their title and estate. Like joint tenants their interests are identical, and all lawful acts affecting the estate, executed by any person having a legal interest in the estate, must pass in its effects through the whole chain of title downwards from him; all claiming under him must submit to the consequence of his act, if lawful, whether it operate in point of interest to their advantage or detriment. The only question in all such cases is, whether the convey-

ance be lawful ; and that point being established, the allowance of its effect must of course follow. Lord Coke says, there are three kinds of estoppels. 1st. Matter of record ; as letters patent, pleading, &c. 2ndly. Matter in writing ; as a deed. 3rdly. Matter in pais ; as livery, acceptance of an estate, &c. He then states another general rule on the subject, in 352 B., “ that estoppel against estoppel doth put the matter at large.” The meaning of this rule I take to be, that where a grantor has estopped himself by his own act from giving evidence of the truth, if some other act in which the grantor is not an agent goes to shew the truth, and at the same time to estop the grantee from denying it, then the court must give it effect and be guided by it. A tenant is estopped to dispute the title of his landlord, but he may prove that it has expired.—4 T. R. 682 ; 3 M. & S. 516 ; 2 Stark. N. P. C. 230. The tenant may shew by the record of a judgment containing the award of *elegit* and return of inquisition, that the lands had been extended and delivered to a third person. This would prove the legal title during the term to be out of the landlord, and establish a right in a third person, by a species of evidence which estops the landlord. The record of a judgment recovered against him in ejectment must conclude him till he shews its invalidity, and enable the tenant to prove the truth in his own defence, which he could not have done but for the judgment. Standing on the lease alone, he is estopped by his own act of acceptance ; but he is relieved by another act, which estops the landlord while such act continues valid.

The foregoing remarks are made to shew the general nature of estoppels, and of privity in estate ; and I will now attempt to examine whether there is an estoppel in this case. It is incumbent on the lessor of the plaintiff to shew a legal title ; an equitable title will not support an ejectment ; and he must recover on the strength of his own title, and not on the weakness of the defendant's title. Possession gives the defendant a right against every person who cannot shew a good title.—4 Burrow, 2487. The lessor of the plaintiff insists that he has made out a legal title. He asserts that



Abbott was estopped by the deed to say he had no estate in the land till he acquired the fee simple by accepting the grant from the crown; and then the estoppel worked on the estate so acquired, and formed a good title not only against Abbott but against the defendant, who is privy in estate with Abbott, because he claims title from him. If the deed had this effect, then the title is good according to 6 Mod. 258; Salk. 277, 2 B. & A. 242.

In the present case, the court cannot fail to notice that the king was the original owner of all the lands in the province; because he must be considered such, not only by the maxims of the common law, but by many express declarations of the legislature, especially in the statutes granting relief to the heirs and assignees of the original nominees of the crown. The preamble to the Register Act has the same bearing. It is in the following words:—"Whereas the lands "now holden within this province under the authority of the "crown will be shortly confirmed by grants from his majesty, "under the seal of the said province." No one can draw any other conclusion from this language, than that the legislature expressly recognized the original right of the crown to the whole of the country. The evidence clearly proves that Abbott took possession, and held the land in question as the nominee of the crown, and accepted a grant from the king in that character. Under such circumstances, I think the acceptance of a grant from the crown, and holding the estate under that grant, estopped Abbott from disputing the title of the crown so long as he claimed title under it. The lessor of the plaintiff undoubtedly claims title in the same way; because he makes it out by the allegation, that the estoppel created by the deed of Abbott to him works upon the estate granted to Abbott by the king, and thereby completes his right to the land. He is therefore, as privy in estate with Abbott, as much bound by the estoppel as Abbott was. In this view of the case the whole matter is set at large; and the defendant was at liberty to prove the truth in his own defence, as he did at the trial.

The law upon which the lessor of the plaintiff relies in support of his title, will be found in 6 Mod. 258, and is to

the following effect:—"If a man makes a lease by indenture of land which is not his, and afterwards he obtains the estate by purchase, that lease shall bind him, his heirs and assigns; and an estoppel which affects the interest of land shall run with it to whoever takes it." Now, in the case here put, the lessor, who acquired the estate by purchase after he made the lease, would not be allowed to impeach the lease by producing the vendor's deed for the purpose of proving his own want of title, if the vendor were a private person; because his deed, not being a record, would be no higher evidence than the lease itself, and consequently not more efficacious in law. The present case I consider to be different; and the reason why the king's grant has a more forcible effect than the deed of a private person, is found in Co. Lit. 352, b. It is there laid down as an exception to the general rule respecting estoppels, "that where the verity is apparent in the same record, the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to allege the truth, when the truth appeareth of record." The expression, "the same record," in the beginning of this sentence, may perhaps appear somewhat ambiguous on a first perusal; and the reader might be in doubt whether it means a record between the litigating parties only, or any record which is applicable to the point in issue, and which might be produced in evidence between the parties to the suit. I think, however, the words "for he cannot be estopped to allege the truth when the truth appeareth of record," in the latter part of the sentence, goes a great way to ascertain the meaning of the writer, and to shew that he intended to include every record which might legally be given in evidence between the litigants. The whole context, too, proves the same meaning; for there can be no good reason for supposing that the words "the same record" can intend any thing more than that a record affecting the same title in dispute between the parties to an action, can be received to prove the truth of the case, although the claim which forms the substance matter of the action is supported by estoppel. I am of opinion, therefore, that the king's grant to Abbott, being a record, comes within

the last mentioned rule, because both parties in this suit are privies in estate with Abbott, and claim the title from him. The record is applicable to both of them. I do not say it is absolutely conclusive between them, for I am aware its validity is liable to be contested; but as it has not been questioned by either party in this suit, I think it must be considered valid and effectual, so far as relates to this suit. I think, therefore, it should be presumed that the king had the fee simple of the land, not only from the nature of his prerogative, but also from the grant made to Abbott, his nominee.

The general principles of the common law, therefore, as well as the record, seem to enable the defendant to take advantage of the truth by setting the matter entirely at large. The case will then be found to stand thus. The lessor of the plaintiff bought the land from Abbott, knowing that he was the nominee of the crown, and had only an equitable title; and that he expected to receive a legal title by grant from the king. McKenzie and wife bought the land after the deed from the king had issued to Abbott, supposing he then had a legal title. They then brought an action of ejectment, and obtained possession. The present defendant Myers, supposing the title to be confirmed to McKenzie and wife by the judicial proceeding of a competent tribunal, made a *bona fide* purchase of the land, and paid a valuable consideration of several hundred pounds.

Now it appears to me, if it were at all necessary to determine which of the present parties had the greater share of equity on his side, it would be a difficult question to solve; and therefore I feel no reluctance in following the strict rule of law, which I think destroys the title by estoppel set up by the lessor of the plaintiff. The doctrine of estoppels has never been viewed with complacency at any period. I have already mentioned the opinion of Lord Kenyon; and I will now shew the sentiments entertained by the courts in the time of Lord Chief Justice Rolle, which appears in his Abridgement, 887, and cited in Bac. Ab. vol. 4, p. 193. Speaking of two tenants in common joining in a lease "for years by indenture of their separate shares," he says, "this

“shall be the lease of each for their respective shares, and  
 “the cross confirmation of each for the part of the other,  
 “and no estoppel on their part, because an actual interest  
 “passes from each respectively, and that excludes the neces-  
 “sity of an estoppel, which is never admitted if by any  
 “construction it can be avoided, as being one of those things  
 “which the law considers odious because it disguises the  
 “truth.” Questions of estoppel are novel in this province.  
 My present impression on the subject may be erroneous,  
 but it seems to me, at this time, that it is correct; and there-  
 fore I must differ in opinion with my brothers, and say that  
 I think a nonsuit should be entered in this case.

MACAULAY, J.—First: the statute 31 Geo. III., and the  
 provincial acts respecting land commissions, with the prin-  
 ciples of the common law, establish that Abbott, when he  
 conveyed to the plaintiff, in 1804, had an equitable estate  
 and interest in the freehold and fee of the premises, and that  
 by the deed and possession given thereunder he transferred  
 such equitable estate and interest to the plaintiff.—31 Geo.  
 III. c. 31, s. 20; 35 Geo. III. c. 5; 37 Geo. III. c. 3; 39  
 Geo. III. c. 2; 42 Geo. III. c. 1; 45 Geo. III. c. 2; 48  
 Geo. III. c. 10; 4 Geo. IV. c. 7.

2. But in a court of law the legal title must prevail, and  
 the plaintiff cannot recover upon an equitable one. A diffe-  
 rent rule might apply if the plaintiff continued in possession,  
 or Abbott or those claiming under him were striving to  
 expel him contrary to the deed of the former.—Adams, 33;  
 6 T. R. 289; 7 T. R. 43, 47; 8 T. R. 2; 5 E. 138.

3. In a legal point of view, the deed cannot operate as a  
 feoffment; which form of conveyance, as far as it transfers  
 an estate not actually owned by and in the lawful seisin of  
 the feoffor, or affects future interests, or in other words acts  
 as an instrument of conveyance operating by wrong upon  
 an estate acquired by wrong, prevails upon the principle of  
 disseisin, and the king cannot be disseised.—4 Cruise Dig.  
 62: Com. Dig. Prerog. D. 71; 2 And. 210; Plowd. 9 N. S.  
 s. 233; Plow. 546; Hard. 422 & 425; Owen, 95; 2 Lev.  
 147; 1 Finch, 241; 5 Cruise. Dig. 39; Co. Lit. 277 (a).  
 Abbott could convey his equitable estate; but the legal seisin



which remained in the crown, he could not convey without disseising the king.

4. As to the possession. Plaintiff had 20 years' possession before the former ejectment brought by McKenzie, reckoned from 1804, but not reckoned from 1809, when the king's deed issued, up to which period the adverse possession, to give effect to the statute of limitations, must have been against the king. The possession, it is conceived, could only have been adverse from the confirmation of the legal estate by the crown, and perhaps not then without entry by the grantor, and expulsion, or other act amounting to an expulsion or disseisin, on the part of his assignee.—See the above cases under No. 3.

As to estoppels.—1. The mutuality of the instrument, as between the plaintiff and Abbott, is sufficient to make his deed to the plaintiff operate by estoppel, if in no other respects invalid, but probably only for the plaintiff's life; because if his wife is not estopped by reason of her coverture, Abbott will not be estopped as between himself and her.—Co. Lit. 45 a., 47 b.; Touch. 53; 2 Co. 4; Cro. Car. 109; Plow. 434, 499, 500; 1 Sal. 275; Moore, 20.

2. In the absence of the king's grant, the principle of estoppels would prevail, because Abbott was *prima facie* entitled, and both parties claim under him.

3. But if the truth appears of record, it is said to destroy the estoppel, even with the court; and the letters patent uncontradicted shew the legal seisin to have been in the crown in 1809; and there is a privity of estate, both plaintiff and defendant claiming under Abbott, and under the same title, viz., the grant by the crown, so that as a record or by privity the patent forms a link in the chain of evidence and proof of title. Then do the deed of the plaintiff and the patent present a case of estoppel against estoppel?

4. Again, if a deed imparts any *present interest*, though less than it professes to do, and the vendor afterwards acquire an enlarged estate, it shall not be an estoppel, as the vendor may confess and avoid it. It shall not endure to a double purpose, to pass an interest and as an estoppel. Though if the vendor have nothing in the premises, then he is estopped.

But as the court can only recognize a legal interest, a legal estate or legal interest must be imparted.—Plow. 434; Pol. 55, 67, 166; 1 Inst. 45, 47; 4 Rep. 53; 6 Mod. 258; Vent. 359; 2 Lord Raym. 1051; 4 Co. 15; 3 Co. 4; 1 Vent. 359. 8 T R. 496; Dyer, 257; Winch. 44.

5. So long as the vendor has nothing, he shall be estopped by *conclusion*; and when he gains an estate, the estoppel will work upon the estate and enure as a title. In the latter case, the estoppel working on the estate is a title, and though the jury find the truth, the court will still judge upon the estoppel; it feeds the deed or inchoate title formerly given.—See various cases, Pol. 67, 166; 1 Sal. 275-6; Lord Raym. 1036-48.

Then, 1. Can the present deed be an estoppel between the plaintiff and Abbott?

2. If so, is defendant bound thereby? Privies in blood and estate are bound.

3. Are the letters patent matter of record to rebut the presumption of legal seisin, defeat the estoppel, and must the court act thereon?

4. Or does the estoppel operate on the estate so as to entitle the court still to adjudge upon the estoppel?

5. To destroy an estoppel as imparting an interest, should it not be a legal and not an equitable interest?

6. Lastly, can the recovery in ejectment by McKenzie affect the present action?—Vide 3 E. 354; Com. Dig. Estop. 2; Bl. Rep. 1261.

Does the priority of registration prevail in this case?

1. It seems to me, the former recovery in ejectment cannot prevail in this case. The plaintiff must recover upon the strength of his own title, and cannot dispossess the defendant unless he shew a legal one.—Com. Dig. Estoppel, 2; Bl. 1261; 3 E. 354; Adams, 188.

2. It has been decided that the Register Acts do not operate to defeat conveyances, as fraudulent and void for want of registration, until some vendee has, by registering his conveyance, rendered it incumbent upon subsequent purchasers to imitate the example; so that the present plaintiff, claiming immediately from the grantee of the crown, does not come within the provisions of the statute.—Taylor's Rep.

3. The question then is reduced to this. Can the letters patent of 1809, open the estoppel? For in the absence thereof, the plaintiff and defendant claiming under the same person, Abbott, the eldest title would prevail, and Abbott be presumed to have been seized in fee.

4. If the patent defeats the estoppel and prior title of the plaintiff, it must do so as proving a want of legal seisin in the crown in 1809; but whether Abbott was seized in 1804 does not appear of record, though it was conceded as to the mere matter of fact. But admitting the patent to apply by relation that the legal seisin continued in the crown till 1809, it is clear that Abbott had conveyed to the plaintiff the equitable estate in 1804; and the grant of 1809 confirmed to Abbott the legal estate previously pledged. Had Abbott died before 1809, it is clear the plaintiff could have as a right obtained a patent in his own name; and it would be apparently inconsistent that the plaintiff (without adverting to the Register Acts) should be worse by reason of the grant preceding the death of the original nominee, than he would have been had it not been sealed in his life time.

5. It is said, "If the truth appears of record there shall be no estoppel;" also, that "if the party does not rely upon the estoppel in pleading, the jury shall not be estopped, but may find the truth." It is the former rule that creates the difficulty here; yet, if we examine the subject minutely, we will find it said, "If the truth appears upon the same record, the parties shall not be estopped."—Co. Lit. 352; Plow. 500; Dy. 244; Inst. 255; 1 Co. 155; 6 Co. 15; Lit. Rep. 283; Com. Dig. Estoppel E. Arch. Pl. 200; 10 Co. 48; 11 Co. 11; 4 Taunt. 23; Lord Raym. 729. There are also cases in which the judgment of a court directly upon a point is as a plea in bar, or is evidence conclusive between the same parties upon the same matter directly again in question.—22 Howell's St. Trials, 538, &c. But this case presents itself under different circumstances; and although the jury may find the truth when the estoppel is not relied upon in pleading, yet when an estoppel works on the interest in the land it runs with the land into whose hands soever the land comes, and an ejectment is maintain-

able on the mere estoppel, 1 Salk, 276 ; and not only the parties and all claiming under them, but the court and jury are bound by this estoppel, and the latter cannot find against it. The law is said to be otherwise in case of obligations, covenants, or personal contracts which cannot be turned into an estate, but in other cases where the estate is bound by the conclusion, and converted into an interest, although the jury find the matter at large, yet the court shall judge according to the law, that the estate is good by reason of the estoppel.—Pol. 67 ; 4 Co. 53 ; Owen 96, 166, 167.

A deed may operate at the beginning by conclusion and pass no interest, yet shall bind the heir, and the estate which afterwards cometh to him feeds the estoppel, and then the estate by estoppel becometh an estate in interest.—Pol. 66 ; Cow. 600.

It is difficult to form a satisfactory opinion upon doubtful questions involving the subject of estoppel, but it appears to me that by construing the letters patent to feed the estoppel subsisting previous to their issue, and as converting an estoppel previously operating by conclusion, into an estoppel becoming an estate in interest, a title in short (rather than as destroying the estoppel, because they are a record, although the truth does not appear *on the same record or deed* creating the estoppel, or by a judicial record upon a matter that has passed in *rem judicatum*) ; the general scope and spirit of the cases and authorities, including our local legislation, taken altogether, are best answered ; at the same time however I am not free from doubts on the subject, but as at present advised, it is my opinion the plaintiff can claim the estate in dispute by estoppel during his life.

*Et per Cur.*—Rule discharged.

#### TANNAHILL V. MOSIER.

It is not necessary in an affidavit of debt for money due for money lent, paid, &c., and upon an account stated, to state what parts of the aggregate sum stated to be due, were upon each of the items or divisions ; the general rule is, that the court will not receive counter affidavits to an affidavit of debt, and will not balance probabilities, or try the merits on affidavit, with a view to the discharge of the defendant. Yet when a debt appears clearly and manifestly not to be due, the court will discharge defendant on common bail.



The plaintiff arrested the defendant upon an affidavit of debt for 2000*l.*, for so much due for money lent, paid, had and received, and on an account stated. A bill of particulars having been called for and obtained under a judge's order, it is composed of various items, for money paid in the alleged behalf of the defendants, with interest thereon, to which is added a large claim for goods sold. The affidavit did not include any claim for goods; an affidavit was submitted, sworn to by the defendant, stating that the claims of the plaintiff grew altogether out of transactions concerning the steamboat Niagara, and her expenses, in which the plaintiff is a joint owner or shareholder, in common with the defendant and others, and that the advances made by the plaintiff were not made to the defendant on his own account, but on account of the stockholders of the boat generally; that the plaintiff was one of the committee of management of the boat, and assumed the right of controlling her; that the sum of 500*l.* mentioned in the bill of particulars, was a sum advanced by the stockholders of the boat generally, to purchase the steam-engine; and the sum of 1000*l.* therein mentioned was a transaction between the plaintiff and one Daly, who transferred shares in the said boat in payment; that the plaintiff from time to time borrowed money from the defendant, and has paid it back in part, and frequently furnished accounts against the stockholders of the boat generally, containing the same charges mentioned in the bill of particulars. An affidavit of Daniel McDougal stated, that the plaintiff told him that the 1000*l.* was for stock purchased from Daly, and that this sum and the sum of 500*l.* above mentioned, were connected with the affairs of the steamboat, with which the plaintiff had nothing to do, unless as a stockholder and captain. An affidavit of one Clement confirmed the affidavit of the defendant, as to the plaintiff's borrowed money from the defendant, and not claiming it in payment of a debt; two other affidavits were produced, shewing that the plaintiff was an absconding debtor, and also, that there was a bill or presentment found against him by the grand jury, for perjury in swearing to the affidavit of debt in this case. It was also stated as within the judicial knowledge of Mr. Justice

Macaulay, that an attempt had been made at judge's chambers in vacation, for the purpose of obtaining a fiat to arrest and hold the defendant to bail in trover for the same sum, under pretence of a conversion of the steamboat, and claiming it as the property of the plaintiff, which application was refused.

*Kay* moved for a rule to shew cause why the defendant should not be discharged from custody.

1st. For defects in the affidavit of debt, in not stating what part of the aggregate sum mentioned in the affidavit was lent and advanced, and what part paid, &c.

2ndly. On the matters stated in the above mentioned affidavits: and the rule *nisi* was granted.

The *Solicitor-General* shewed cause.

As to the formal objection made to the affidavit of debt, it is well known that the manner in which this affidavit is drawn, is that usually practised, and I am not aware of any authority to shew that it is wrong.

With respect to the matters stated in the affidavits, although it must be admitted that there are cases in which the courts have interfered, and discharged a defendant, yet they have never done so unless in very plain cases, where it is apparent beyond contradiction, that the plaintiff was for his own purposes abusing the process of the court, for his own evil purposes; and the courts have always expressed the greatest reluctance to interfere, and have refused to do so when the slightest doubts have existed as to the facts of the case; here we have the plaintiff's affidavit only opposed in the whole by the defendant's; the remainder of the facts stated merely shew probabilities as to parts of the demand, very proper to go to a jury, but which the court will not try; the defendant can plead the nonjoinder of the other defendants in abatement, but he is jointly liable with them, or he may set up the partnership of the plaintiff as a legal defence, but if the defendant have possession of the steamboat, on which the plaintiff has expended so much money; there is nothing very equitable in the defendant's case, to induce the court prematurely to enable him to set up these defences, which in other cases are certainly not much favoured, but are considered as strictly legal, and not equitable. As to the application

made at judge's chambers, even if it be taken for granted that the arrest intended in that case, was for the same matters in difference in this instance, yet it would be very hard if the plaintiff's mistaking his remedy, and making an unsuccessful application, were to deprive him of the opportunity of pursuing a correct course afterwards; and a mistake as to who is the legal owner of such an article as a joint-stock steamboat, for the building and expenses of which the plaintiff has principally paid, may be innocently and easily made by him, and ought not to conclude him as to his proper remedy.

*Sullivan*, in reply, relied entirely on the matters stated in the affidavits, which prove a case of hardship and oppression, which, if the court refuse their assistance to the defendant, must result in the ruin of the defendant, the sum being so large for which he has been arrested, that it is impossible for him to procure bail; and the plaintiff's being a bankrupt and absconding debtor prevents the possibility of the future recovery of any damages for the present malicious arrest and false imprisonment. This case seems to be one peculiarly calling for the interposition of the court, as the application made for the judge's fiat, and the circumstances disclosed on the several applications, shew plainly that the defendant is arrested and imprisoned from malicious motives, and not from any hope on the part of the plaintiff of ultimately recovering any part of his demand. It is impossible that the plaintiff could at one time swear to his property in the boat, and on this failing, endeavour to charge the sums expended on that boat upon another person, without knowing that in one instance or the other he was swearing falsely, and this is the view taken of the matter by the grand jury. The charge made against the defendant for the several sums of 1000*l.* and 500*l.*, mentioned in the affidavit of the plaintiff and Mr. McDougall, are plainly a most infamous pretence, in which the plaintiff could not be mistaken. If the arrest had been for the remaining sum, deducting this 1500*l.*, the defendant might find bail. But as to the whole sum, it appears plain that the plaintiff himself was the person principally interested in the steamboat; the advances he made for her, were not under the control of the defendant, nor for him; they were

made for the benefit of the plaintiff himself, and on no principle of justice or honesty can one partner, because he happens to engage in an unsuccessful speculation, claim back his advances from another, more particularly when there are a number of others. The defendant's affidavit is supported so strongly by the other affidavits, and placed so far beyond doubt by the plaintiff's bill of particulars and the previous application, that the court will find themselves fully borne out by the following cases in discharging the defendant, notwithstanding the reluctance which the court always shew to enter into anything like a trial of facts.—Forrest, 153 ; 3 E. 169 ; 2 Chitty, 20 ; 2 Marsh, 549 ; 5 B. & A. 904.

ROBINSON, C. J.—Although the interposition of the court prayed for on this motion is certainly not usual, and is never granted except on the strongest grounds, I am of opinion that we should grant the application. Everything concurs to make it reasonable and proper ; the sum is very large, the demand very old ; the possibility of the existence of any such claim as is sworn to in the affidavit of debt, and specified in the particulars rendered, is strongly rebutted by the affidavit of the defendant and another person conversant with the transactions which are made the grounds of this arrest, and all these statements are suffered to pass unexplained and unanswered.

The plaintiff, who has this defendant imprisoned for an alleged debt of 2000*l.*, is himself an absconding debtor, and though it would be unsafe to allow ourselves to be governed by this other fact which is before us, it tends at least to throw a deeper shade of suspicion over the conduct of the plaintiff, that in the district from whence he absconded before making this affidavit, he has been since indicted for perjury by a grand jury, in making this very affidavit. Another fact more convincing than any I have mentioned, is within our own knowledge. This plaintiff before the last term applied to us severally in chambers by his counsel, for an order to arrest this same defendant in trover for 2000*l.*, and finding that neither any judge then nor the court in term (Hilary) would consent to grant the order, he immediately arrests as for a positive debt, not for goods sold but for money paid, money



lent, and on an account stated, for the enormous sum of 2000*l.*, and upon demand of particulars exhibits an account, which if it were not shewn to be unfounded and fictitious by the defendant's affidavits, we cannot but see must have been equally due to him at the very time that he was in vain trying to procure a special order to arrest the defendant in trover. It is not credible that he would unnecessarily have made these ineffectual attempts to detain, for an alleged tort, a man against whom he held all the time a claim for 2000*l.*, of such a nature that he could at any moment arrest him as a matter of course, and thereby at once secure himself against the risk of his departing from the province, of which he has on oath declared himself apprehensive.

On the authority of the cases cited, 3 E. 169; 2 Chitty, R. 20; and 5 B. & A. 904, I think the defendant should be discharged. The case is a very strong one, as it ought to be to justify us in such an interference.

6 Dow. and Ry. 24; 1 Wilson, 335; 2 Marshall, 548, are authorities against this application; but in the first case the circumstances, as they were stated, were not such as would lead any discreet mind to the absolute conclusion that no such debt was due. The court, on the contrary, seemed to think that the defendant's affidavits, on which he moved, were evasive; and were by no means satisfied that he had merits, but rather the reverse. In the case in Wilson, the language of the court is strong against this kind of interference; but there the debt sworn to was small. It cannot be supposed that the defendant, a revenue officer, need have suffered a close confinement from inability to procure bail. Though there might be a reason therefore to suspect an abuse, there could hardly have been any pressing reason for summary interference, out of the ordinary course. The magnitude of the sum here, coupled with the other facts, has great weight with me. If we turn, however, from the case in Wilson to the case in 5 B. & A. 904, we shall see at once that the courts do not intend to lay down their general principle so broadly as to exclude all reference to the facts of each peculiar case. There need be no apprehension that this court will be unable or unwilling to exercise a discretion

in cases of this nature, which will prevent wrong to the honest creditor. In the course of near 40 years, this is perhaps the first occasion on which the court will have granted relief against an arrest upon such grounds, if they should grant it here; and I think it very probable that 40 years more may elapse, before another case of so glaring a character as this appears to me to be, may call for a similar interposition. It is to be remembered that in relieving from an arrest, we are not dispensing with the affirmative words of any statute which declares positively that the plaintiff shall have the right to arrest on swearing to a sum certain. The right to arrest depends rather on a practice of the court, and the acknowledgment of the legislature implied in the provisions which restrain arrests. The statute provides that no person shall be arrested and held to bail, except when the cause of action amounts to 5*l.*, and unless affidavit is made of the cause of action, &c. If no authority could have been found for granting relief in a case like the present, I should still have been of opinion that the general principle, that the cause of action cannot be tried on affidavit, must admit of some control, because circumstances may be imagined of so outrageous a character, that common sense must compel us to admit the possibility of extending relief; and the law is not so stern, that people must of necessity lose their liberty, and perhaps in consequence their lives, while a court of justice must helplessly look on, seeing and not doubting that a most oppressive and abusive use is made of their process, but imagining themselves disabled from interfering, because they must hold a maxim to be inflexible that is just and sound as a general rule, but which like most other maxims must in its application be controlled by reason. A person reading the case reported by Sergeant Wilson, may draw from it the apprehension that the rule is inflexible, because the relief is there denied, and the rule is asserted; but when he turns to the later cases I have cited, he finds it is not inflexible, and that although the rule is always asserted and admitted, it does not prevent all inquiry into circumstances, nor the cognizance of manifest abuses. I should feel less responsibility in rejecting an application of this

kind if the defendant had procured bail; but where he is suffering a close confinement, and probably inevitably so from the magnitude of the sum, a confinement that may ruin his health and irreparably injure his interests, and for which he would in vain look for indemnity from an absconding debtor, I cannot refuse to look into the circumstances; and I find them so strong, as to leave no doubt in my mind that this arrest is a palpable perversion of the remedy given by law, to the purposes of oppression. If they did not produce this conviction on my mind, I should feel it impossible to interfere.

Besides other circumstances which I have alluded to, I find that the plaintiff has arrested for 2000*l*. He has been required to furnish the particulars of his claim, and he has done so. Some of it is for alleged payments made by him on defendant's account nearly eight years ago; most of the account is of five or six years' standing; and the items of 500*l*. and 1000*l*., are charges which the defendant and a third person give such an account of on oath, as shews that there is no pretence for bringing them as charges against this defendant.

Now it is possible, in the sense that most things are possible, that the defendant may owe the plaintiff as he has sworn, and that all that is set forth on the part of the defendant is gross perjury. It is possible also, that the defendant, bordering on insolvency and at length an actual insolvent, should have so great forbearance as to leave a debtor who owed him 2000*l*. for five years unmolested, and even to borrow from time to time small sums of money from this defendant, as is sworn, and repay them as if he was not his creditor. It is possible also, that the plaintiff may have been uselessly urging attempts to arrest a man for a tort, at the very time when he could of right have arrested him for an immense debt. It is possible also, that the allegation of the plaintiff's being a partner or stockholder in this boat, and of the sum of 500*l*. being a debt of defendant's own, and not on account of the boat of which the plaintiff was part owner, and of the sum of 1000*l*., instead of being money paid by plaintiff to Daly for defendant's use, being

the mere consideration of stock purchased of Daly : it is possible that all these allegations may be false and deceitful; and if so, it is possible that by discharging the defendant from custody, we may be depriving the plaintiff of his security for a large debt. But I feel myself bound in a case like this, to consider that all these allegations and circumstances relate to matters peculiarly within the plaintiff's knowledge, that he has chosen to be silent on all of them, and to leave it to us to draw such inferences as we please.

This is not the manner in which similar applications have been met in the cases cited; and if the plaintiff should suffer from declining to repel statements which bear so strongly against him, the blame rests on himself. I would rather, under such circumstances, run the possible risk of prejudicing his remedy, since he takes no pains to support it, than incur the hazard of ruining the defendant, by leaving him exposed to the consequence of a close confinement for a demand which, on the facts disclosed and not repelled, I believe to be in a great measure if not wholly unfounded.

SHERWOOD, J.—I regret I cannot coincide in opinion with the Chief Justice. His views of the case appear founded in equity; but the general rule of law, and the established practice of the Court of King's Bench in England, are against determining the merits of the action on conflicting affidavits. It is true, the defendant has filed affidavits of three persons; but they do not positively shew the debt is not due. They merely express an opinion that 1500*l.* of the sum sworn to was not advanced by the plaintiff; they think that sum was paid on account of the joint owners of the steamboat Niagara, if paid at all. I think the cases 5 B. & A. 904, and 6 D. & R. 24, go to establish this doctrine, "that the court must be convinced of the non-existence of the debt, before it will proceed to discharge the defendant on motion." If it clearly and manifestly appeared that the defendant owed but a small part of the amount sworn to, he might perhaps be discharged in the same manner as if it appeared he owed nothing. I cannot come to a conclusion, from the information before me, whether the defendant owes something or nothing. The case pre-



sents itself in a very questionable shape, and affords no satisfactory solution of the matter. The plaintiff positively swears to a large sum being due ; the defendant swears the reverse ; the two indifferent persons speak neither positively nor clearly either way.

Under such circumstances, the facts of the case must, in my opinion, be submitted to a jury of the country. There is no other constitutional course to pursue. I think the case does not form an exception to the general rule of law and to the practice of the court ; and therefore feel constrained to dissent from the defendant's discharge. I cannot interfere in this case, because I have no authority to try the question of debt between the parties. If the plaintiff admitted the inexistence of the debt, or if the fact were clearly established in some other way, the defendant might be discharged. He cannot be discharged, however, on this application, for want of clear and satisfactory proof of a wrongful arrest.

MACAULAY, J.—The plaintiff has arrested the defendant for 2000*l.*, for so much due for money lent, paid, had and received, and on an account stated.

The defendant objects in the first place, that the affidavit is too general—that it should designate how much is due on each substantive cause of action, and not embrace the whole in one sum, as is the case.

I do not find this objection ever taken in the courts in England ; and from the forms of affidavits in the following cases, and the exceptions urged against them, I infer the objection is not deemed tenable, and that, if taken, it would not be sustained.—2 M. & S. 603 ; 2 B. & A. 596 ; 1 Chit. R. 333 ; 9 B. & C. 543, and others ; 3 Lig. Ob. 46 ; 7 Taunt. 275 ; 1 Mor. 24.

2ndly. Admitting the sufficiency of the affidavit, the defendant prays to be discharged upon grounds disclosed by counter-affidavits.

The grounds submitted by the defendant are, that all the claims of the plaintiff arose out of transactions with the steamboat Niagara, in which defendant asserts the plaintiff to be a joint owner or shareholder, in common with himself and others ; and that as tenant in common in the vessel, he

cannot sustain a suit at law against the defendant. The justness of the demand to a great extent is not impugned, and the defendant's claim to relief is rested exclusively in the joint interest of the parties in the subject matter.

There is, as to the whole demand, the affidavit of Mr. Clement, proper to go to a jury, but involving directly the merits upon presumptive proof, it is not available with the court. On this application we cannot investigate and try the merits; we cannot weigh and balance probabilities.

As to 500*l.* paid at Brockville, there is in addition to defendant's affidavit the affidavit of Mr. McDougall, calculated to exonerate the defendant wholly from that demand; and McDougall also corroborates the defendant's representations as to the 1000*l.* paid Mr. Daly. All the residue of the demand rests upon the defendant's own denial and assertion, with Mr. Clement's presumptive support. When called upon, in chambers, to grant an order to arrest the defendant in trover for the steam-engine of the Niagara, at plaintiff's suit, I declined compliance, having a discretion to exercise which I do not feel possessed of upon the present occasion to the same extent. But as far as that application can properly be adverted to, it is right to observe, that although I refused an order to arrest unless certain matters of which I had previously acquired judicial knowledge were explained, yet an assignment of the engine by defendant to plaintiff some years ago was exhibited to me, and the circumstances to which I allude in rejecting the application were as well calculated to shew that the defendant had not such an absolute property and interest in the engine as he asserted in the instrument laid before me, as that the plaintiff had a legal right to arrest him for a subsequent conversion of his property alleged to be acquired under that title. I do not think, therefore, that that former proceeding should weigh further, than that a solicitude to arrest in trover, before the present arrest, may seem incompatible with the existence of the present claim, and a sincere belief that the defendant would abscond. The demand now set up was equally jeopardized, and it is one for which the plaintiff might have arrested at once. To this

it may be replied, that he desired to sue out both writs at once; and apprehending the ultimate rather than the immediate departure of the defendant, he considered the delay unimportant.

It is also alleged that the plaintiff is an absconding debtor; but any person, foreigner or subject, possesses the right of resort to our laws to enforce any demand due from an inhabitant of this province, and as a means of securing the same may arrest and detain the party within this jurisdiction. It follows, that although a fugitive debtor resident abroad, the plaintiff has a right to proceed by bailable process; and his having absconded cannot affect the present case, or the legality or validity of his demand, unless as a circumstance, affording, like Mr. Clement's testimony, a certain admissible measure of presumptive proof that such demand is in point of fact unfounded. It will be found, on a reference to the cases, that the merits cannot be examined on motion through the medium of such presumptions.

Another circumstance is the presentment for perjury: it is a strong case, but being *ex-parte*, a like proceeding would not afford ground for a new trial in the instance of a witness indicted; and the cases on that head equally apply here. Besides the perjury is not defined, and it may consist in false swearing to certain items, and not the whole demand; and the evidence laid before the grand jury is not disclosed to us. As respects the law of arrest generally, I have no doubt it frequently leads to abuses: there are strong circumstances here to shew this to be an instance. My own private persuasion leans against the plaintiff's proceeding; but in disposing of the present case, I must be regulated by the principles deducible from the decisions, as applied to the facts judicially before us. Familiar as we have become with the difficulties, affairs, and disputes attending this steam boat and its management, it is difficult to separate in the mind and exclude from immediate presence many facts and various circumstances which, although within my individual knowledge and recollection, are not brought forward nor submitted in support of the present application. Shutting out all extra-judicial knowledge, I mean all information not

disclosed by the documents filed in this suit, it appears that the plaintiff has arrested the defendant upon the ordinary affidavit of debt, to rebut which there is—

1st. Mr. Clement's affidavit of circumstances, impeaching indirectly only the validity of any demand. 2ndly. The proof that the plaintiff was an absconding debtor at the time of the arrest. 3rdly. The presentment for perjury. 4thly. The affidavit of Mr. McDougall, respecting two items of 500*l.* and 1000*l.* 5thly. The bill of particulars; which more or less throughout bears relation to the steamboat Niagara. Or 6thly. The defendant's affidavit, that with some of the items, especially the 500*l.* and 1000*l.*, he had no connection directly or indirectly; and as to the residue, that the demand, if any, is against the owners of the Niagara, of whom plaintiff is himself one, and not defendant individually.

The utmost effect of an adoption of McDougall's affidavit would be to shew an excessive arrest, instead of an arrest without any foundation. Of the whole it may be said, that the matter elicited directly involves the merits—into which the courts seldom if ever enter at this stage and in this way, and portions of it at least are obviously not conclusive. As to what the defendant says, there is merely his assertion against the plaintiff's.

Mr. McDougall's confirmation is not founded on documentary proof, but the recollection he retains of the plaintiff's admissions as to 1000*l.*, and his positive knowledge as to 500*l.* Of the plaintiff's proofs we are ignorant; but admitting a *prima facie* case established, which the plaintiff's affidavit must be assumed to afford, it rests not upon conclusive proof that there is no right of action against the defendant, but upon *viva voce* testimony, proper to be weighed by the jury. Mr. Clement's affidavit, the plaintiff's residence abroad, and the presentment for perjury, are all proper to be considered when the merits are to be determined; but they amount only to probable or presumptive evidence. It is not upon presumptions, but upon unequivocal conclusions only, that the court could relieve from arrest.

I am not a strenuous advocate for the law of arrest, with-



out at least greater modifications than it has experienced here; but while it subsists we must give it full effect. The privilege is liable to abuse. I may be well persuaded that the present is an instance of abuse; but can I therefore discuss the merits and liberate the defendant? I fear not.

The legislature, aware of the chances of abuse, and also of the inflexibility of the rules adopted by the courts, have interposed; not to require or encourage a relaxation of those rules, but to afford summary relief as to costs after trial, as the law before afforded redress by action, upon the determination of the suit instituted by a malicious arrest. It would have been easy for the legislature to have enlarged the discretion of the court, had it been deemed expedient. It has not been done, and the rules laid down therefore operate as binding upon us.

The courts have always examined into collateral matters entitling a party to be discharged, but (in the King's Bench) not into the merits, except in two or three glaring cases, where the proof was apparent, and no room remained for doubt or conjecture. They have refused, upon the principle that the plaintiff's affidavit shall not be aided by anything supplementary, that he must stand or fall by his first statement. The books abound with cases in which the merest slip in the original affidavit has availed the defendant, and the courts have been strict in excluding any supply of defects. Many cases may be found where the ends of justice would have prompted relaxation, but the courts have been firm. They have been equally firm in excluding counter affidavits; for if the plaintiff's affidavit could be rebutted or impeached, of course it might be sustained and upheld, and the consequence would be a constant collision and discussion of the merits upon preliminary motion. The best rule, though at the expense of occasional individual inconvenience, is found to be in the opposite course.

It is true that in the Common Pleas counter-affidavits and affidavits supplemental have been received, but with great caution and hesitation.—1 Salk. 99, 100; 1 Lord Raym. 383; 1 Wils. 335; Sayer, 533; 2 Wils. 225; 2 Stra. 1233; 1 Bl. 192; 2 Bur. 655; 2 Bl. 886; 1 H. B. 10; 1 H. B. 301; Forrest,

155; Bar. 61: ib. 76; ib. 109; 1 T. R. 7, 716; 2 T. R. 572; 5 T. R. 552; 2 M. & S. 563; 7 Taunt. 408; 1 Moor. 12; 7 Taunt. 235; 1 Mar. 548; 4 Moor. 4; 9 B. & C. 543; 3 E. 169, 309; Dow. 456; 2 Chit. 20; 5 B. & A. 904; 6 D. & R. 24. In this case it is said, when the defendant is arrested for debt which is clearly and manifestly not due, the court will discharge him out of custody; yet the general rule of law and long established practice of the court, has been not to try the merits of the case upon affidavits. The other exceptions to this rule are there cited.—1 Arch. Pr. 66; Petersdorff on Bail, 192.

I cannot say that on the face of these papers such facts are unequivocally disclosed, as manifestly tend to shew that there could be no such claim as the plaintiff has set up against the defendant. It does not appear perfectly clear and plain that no debt is due. If one's mental eye could look beyond the depositions, obstacles would still occur; for if the defendant at one time assigned the engine to the plaintiff, it is hard to conjecture, in the state in which the affairs of the vessel seem to have been involved, what responsibility, exclusively personal, the defendant may not have assumed to the plaintiff, whose claim against some parties for advances to a large amount is not controverted.

*Per Cur.*—Rule refused.

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WASHBURN, ADMINISTRATOR CUM TEST. ANNEX. OF JAMES MONK, DECEASED, V. WILLIAM DUMMER POWELL.

The Court will not allow the revival of a judgment by an administrator pending an appeal to the Court of the Governor in Council, or the King and Privy Council, although it be suggested and proved by affidavit, that the administrator has been informed and believes the plaintiff in the court below, in whose favour the judgment was given, died after the judgment, and before the allowance of appeal.

The original plaintiff obtained a judgment in this court for 470*l.* 10*s.* 9½*d.* debt, and 40*l.* 12*s.* 9*d.* damages and costs; from which judgment the defendant appealed to the Court of the Lieutenant-Governor in Council. The writ of appeal was sued out and allowed. Upon this appeal the Court of the Governor in Council affirmed the judgment of the court below; whereupon the defendant again appealed to the court of the King in Council.

The final judgment of this court was entered 30th November, 1826, as of Mich. 4 Geo. IV., to the first day of which term it related (6th November), at which time the plaintiff was living; on the 19th January following, security for the debt and costs was put in and allowed; on 13th March following, the writ of appeal was allowed. Since the affirmance of the judgment of the court below, the plaintiff in appeal has put in security for an appeal to his Majesty and Privy Council, which has been allowed by rule of the court of the Lieutenant-Governor in Council, dated 7th February, 1832.

*Washburn* having obtained administration *cum testamento annexo* to the estate of the plaintiff in the court below, and at his instance a *sci. fa.* to revive the judgment, bearing teste the 19th November, 1831, issued.

*Baldwin*, in Michaelmas term, obtained a rule to shew cause why all further proceedings on this *sci. fa.* should not be stayed until the decision of his Majesty and Privy Council, or until this court shall make further order therein, or why all further proceedings for entry of the judgment upon the *sci. fa.* should not be stayed until the decision of his Majesty and Council, or until such further order.

*Baldwin* read affidavits to shew that a transcript of the proceedings was bespoke, and every exertion making to prosecute the appeal to his Majesty and Privy Council, and that the appeal was not for the purposes of delay.

In Hilary Term *Washburn* shewed cause, producing an affidavit that he was informed and believed that the plaintiff in the original action died about the 10th November, 1830, prior to the allowance of the writ of appeal; and agreed that there being no such person living as the defendant in appeal at the time of the suing out the writ, the appeal from its commencement must be considered as nugatory and void, and as such cannot be considered as a stay of any proceeding in the court below. There are certain notices necessary by the statute constituting the Court of Appeal, to be served on the party in whose favour the judgment appealed against was given, or upon his legal representative, before the appeal could legally be allowed to proceed. In this case the death

of the defendant in appeal, as he is called in the courts above, operated as a revocation of any authority which any person might have had to receive these notices, or to act for the defence of such appeal. The whole proceeding which has taken place being void, no further appeal founded on it can be considered to have any effect in staying execution. If the defendant wishes to appeal from the judgment now, let him commence his proceedings in appeal *de novo*; but as this appeal can ultimately have no effect on the judgment, it would be useless to stay the proceedings on *scire facias*.

*Baldwin*, in reply.—The statute 34 Geo. III. ch. 2, is mandatory on this court to allow of the appeal, upon proper security according to its provisions being put in; and the security and appeal having been once allowed, the cause is taken from the jurisdiction of this court until the appeal is disposed of. If the administrator of defendant in appeal rely upon the death of the defendant, as destroying the effect of the appeal, he may plead it in abatement, or suggest it in the Court of his Majesty in Privy Council. All that this court can at present know in the matter is, that their judgment has been appealed from, and that the case is yet undisposed of in the courts above.

SHERWOOD, J. (after stating the case).—In my opinion, the proceedings should be staid on the *scire facias*. A writ of appeal has issued from the Court of Appeal, and has been allowed here. The security required by law has been entered in this court by the appellant, and a transcript of the judgment here has been taken to the Court of Appeal. I consider the provincial statute, 34 Geo. III. ch. 2, sec. 35, as mandatory on this court to stay execution, when an appeal has been brought from its judgment, and when the proper security has been perfected to prosecute the appeal, and to pay the condemnation money, costs and damages. In my opinion, this court ought not to allow any step towards execution to be taken, till the proceedings of the Court of Appeal in this province, or the proceedings of the King in Council, be remitted to this court, either directly or through the Court of the Governor in Council.



The statute, in my opinion, prohibits the issuing of execution in this stage of the proceedings; and as the *sci. fa.* is sued out for the purpose of obtaining execution, the common law maxim of “quando aliquid prohibetur omne, id per quod devenitur ad illud,” is applicable to the proceedings on the *scire facias*; and such proceedings, it appears to me, should be stayed. There is nothing before the court to establish a right on the part of the administrator to have execution; but on the contrary, sufficient to shew that no such right exists.

MACAULAY, J.—If there was nothing peculiar in this case, I should have no difficulty in preventing the execution pending the appeal, the securities required by the statute operating as a supersedeas. But it is affirmed, that the plaintiff in the cause died before the first appeal, and it becomes a question whether (if the fact be so) the appeal is nugatory and void, so that in law the proceedings have never been removed, and consequently the judgment in the Court of Appeal here not sufficient to sustain an appeal to his Majesty in Council.—Tid. 574; 1 Stra. 519, 526; 1 wills. 120; 3 Bur. 1389; Cow. 72; 3 T. K. 78, 643; 3 T. K. 64; 2 T. K. 78; 4 Bur. 2454; 3 Mod. 187; Carth. 30.

The principal impediment to an appeal, after the death of the plaintiff, is the possible want of a representative upon whom to serve the notices, &c., required to perfect the securities; but that obstacle seems to have been surmounted in the present case, and now an appeal of another kind is contemplated.

I think it should be open to the present defendant to contest the fact of the time of the plaintiff's death, and to place upon record the legal point arising out of it, when ascertained, so that an appeal therein may be had, as well as from the original judgment; and consequently that the defendant should plead in abatement of any recovery to have execution by the plaintiff's administrator, the pendency of the appeal here (2 Lord Raym. 1295; 2 E 439), the result, and the appeal therefrom to his Majesty in Council; to which the plaintiff might reply, the death of the testator before the appeal sued forth. It is not for the court to

prescribe the forms to be adopted, or the entries to be made to sustain the pleadings.—Carth. 236 ; Comp. 441 ; Stiles, 470 ; Moore, 701 ; 3 Rep. 571. I do not see that the proceedings can be stayed upon the suggestion of an intention to appeal further ; an appeal and the entry of security operate as a supersedeas of execution ; but until the appeal, I apprehend that the proceedings may go on. I have no objection, however, to grant a short time to plead, with liberty to enter at the expiration thereof any answer that could be received now.—V. 3 Keble, 520, 594, 467, 571 ; Carth. 236 ; Comb. 441 ; Stiles, 478 ; Moore, 701 ; Showers, 186 ; 1 Sal. 264 ; 2 Lord Raym. 1295 ; T. Ray. 59 ; Barnes, 432 ; Carth. 339 ; 4 Bur. 2544 ; 3 T. R. 643 ; 2 E. 439 ; 7 E. 296 ; Bac. Ab. Error, Tidd. 8 ed. 574-5-6, 1201-2.

It is obvious, from the foregoing, that I am of opinion an appeal lies from a judgment of this court on *sci. fa. quare executionem non*, although the principle judgments were formerly appealed and affirmed, when the judgment is founded upon new facts, and *ex post facto* circumstances disclosed in the proceedings upon the *sci. fa.* The appeal being as to the judgment on such new facts, and adopting, not impugning, the original judgment.

Error will not lie upon an award of execution in the exchequer chamber, after affirmance, by reason of the peculiar wording of 27 El. ch. 8, yet it may in parliament ; and our provincial statute grants an appeal from all judgments given in this court ; and although the same judgment cannot be twice appealed, yet a judgment in *sci. fa.*, involving new facts and points, may be appealed. It is not the same judgment as the original one on which it is predicated, and which it adopts as its basis.—Sty. 281 ; 1 Sal. 262 ; 4 Mod. 314 ; 1 Stra. 197 ; Lord Raym. 1285 ; Bac. 277 ; 1 Mod. 79 ; 3 Dyer, 315 ; Skinner, 683 ; 1 Sal. 263 ; Lord Raym. 97 ; 5 Mod. 558 ; Comb. 393 ; 12 Mod. 105 ; Holt, 271 ; Hoq. 72 ; 1 Vent. 38, 168-9 ; Cro. Jac. 171.

The case of Gray v. Wilcocks is expressly in point, except that there was no judgment, properly speaking, but a refusal of a particular kind of execution on the prayer of the plaintiff entered on the roll.—See 1 Keb. 256 ; Pra. Ca. K. B.

49; 3 Mod. 187; Carth. 30; Stiles, 174; Pl. 40<sup>1</sup>; 8 Co. 443; Str. 1102; 3 Mod. 180; Cro. Car. 286, 300, 464. As to the nature of a *sci. fa.*, see 2 Sand. 6 (a), 71; 2 Lord Raym. 1048; 3 Mod. 187, 180; 8 Mod. 188-9.

*Per Cur.*—Rule absolute (to the extent warranted by the above opinions. J. M.)

N. B. The Chief Justice having been engaged in this case when at the bar, gave no opinion.

### WALTON V. HAYWARD.

The court refused to discharge a defendant, arrested after giving a cognovit, and before the time until which execution was stayed had expired.

N. B. There was no process issued previous to the cognovit, and the affidavit of debt was not entitled.

The defendant gave to the plaintiff a cognovit for 300*l.* true debt, containing an agreement that the plaintiff might have judgment *instanter*, but with a stay of execution till the first day of Michaelmas term then next. There was no suit commenced previously to the giving the cognovit. In the vacation before Michaelmas term, before the expiration of the time for execution to issue, the plaintiff's agent made an ordinary affidavit of debt, not entitled in any suit, for 300*l.* (this being the same debt mentioned in the cognovit), and arrested the defendant.

The *Attorney-General* in Hilary term last, shewed cause against a rule obtained by *Baldwin* in Michaelmas term, to shew cause why the defendant should not be discharged, on the ground of the stay of execution not being expired. He argued that the proceeding was correct on the part of the plaintiff, who did not by the terms of the cognovit, debar himself of his right to have the security of bail; he only agreed not to sue out execution. If a judgment had been entered, and the defendant arrested on a *ca. sa.*, there might have been some grounds for this motion. But besides, this proceeding is not on the confession; there was no action instituted according to law; the writ on which the defendant is arrested commences the suit; the affidavit is not entitled, and the writ is original and not an alias, as it must have been in case the confession were considered a commencement of the action. The plaintiff in this case abandons the

cognovit, and proceeds on the original consideration, as he has a right to do ; the cognovit having no force nor virtue until some proceeding is had upon it. If the defendant considers this cognovit as sufficient to institute an action, why does he not plead in abatement that another action was pending, which he can do on the plaintiff's declaring, instead of trying the matter by a motion. The jurisdiction which the court assumes over the agreement usually added to cognovits, is founded on strict principles of equity and justice ; and the court will not allow an improper use of such agreement, and much less extend its literal meaning, for the purpose of enabling a dishonest debtor to evade the law, by giving a confession in the first place, after which he might leave the country, and hold his creditor at defiance, who then will have no means to stop him. If the court should discharge this debtor, plaintiffs will be afraid to take cognovits, which are now found so beneficial, and much expense and oppression to debtors must be the consequence.—6 T. R. 616 ; Whiteoak, R. 72 ; Str. 1216 ; 1 Chitty, 275.

*Baldwin*, in reply.—The practice of taking cognovits, without suing out writs, has obtained too long unquestioned, and been found by far too beneficial, to be at this day destroyed or disputed. It is analogous to the English practice in ejectment, where no writ issues, and in which the consent entered into by the defendant is sufficient to give the court authority. In this case, it is true, a plea in abatement could not be sustained, as though when a judgment is entered on a cognovit, and no writ had actually issued to found the confession on, the court may not allow of the objection, or would, as is more likely, authorise the issuing of a process tested in time to support the cognovit and judgment. Yet it is not to be expected that they would here, at the instance of the defendant, and for the mere purpose of supporting a plea in abatement, allow such a process to issue. The question here is simply, whether a stay of coercive proceedings is intended or implied in the stay of execution. The intention of a defendant in giving a cognovit with a stay of execution, is evidently to save expense ; but if the plaintiff be allowed to commence proceedings and



carry on the suit in precisely the same manner as if no cognovit had been given, the taking the confession is merely a trap or device, by which to place the defendant in the very circumstances he wished to avoid by giving the cognovit. For instance, in this case (unless the defendant can find bail) the plaintiff need not declare for two terms after suing out the writ, nor go to trial for a considerable time, during which the plaintiff would be confined, without the opportunity of going on the limits or taking advantage of the Insolvent Act. In the mean time, the plaintiff has all the advantage of the confession, and can make use of it as evidence under the count for an account stated. In the same way, a debt might be recovered by execution before the time is out which is agreed upon. The plaintiff may abandon his cognovit as a legal proceeding, bring his action in the ordinary way, merely make use of the confession as an acknowledgment of a debt, and sue out execution, which, not being in the *same action* which the cognovit professes to be in, but in one commenced afterwards, would not be more against the literal meaning of the agreement than his arrest. In short, if this proceeding is sustained, it will in all cases be imprudent for the defendant to confess the action. As, notwithstanding any protecting agreement he may make suppose that in this case the plaintiff had entered judgment, and arrested in an action on that judgment, it would not be more in breach of the agreement than this proceeding; and yet in 1 Salk. 596, the contrary is held. The execution is to issue *in default of payment* at a certain day; so that until then payment was not contemplated, nor the debt payable.—2 Bos. & P. 150; 4 E. 188; 1 Taunt. 189.

ROBINSON, C. J.—In strictness, there can be no illegality in suing out process as for a new cause of action. The cognovit is a mere agreement; it is not an action pending; and if it were, this should be pleaded in abatement, but clearly it could not. Look at the form of such plea. Can it be said that the plaintiff impleaded the defendant, or can a record be averred? There is none. Then if the plaintiff had taken out common process, it could not be pleaded in abatement. Would it or ought it to be set aside by the court on motion?

I should say not. Why should it? The defendant has acknowledged a debt. Why should he not be sued for it? It is due; but he says, the plaintiff has come under terms not to sue out execution till a day yet to come. Why should that suspend any step towards execution? Entering judgment is no breach of the terms. It may be important to the plaintiff for his security, and to prevent the priority of others. It may be argued that the giving a day for execution is an implied extension of credit. That I do not see, however, further than that execution is restrained to that period.

It may be said with truth that, according to reason and ordinary practice, when the defendant gives a *cognovit* he is taken to have waived the necessity of process to bring him into court; that he does it to save expense; and it may be thence contended, that if, nevertheless, the plaintiff abandoning this, proceeds upon the original action, he acts oppressively and ought to be restrained. But if plaintiff may at once proceed to judgment, as I think he may, his right to file a declaration is necessarily implied; and as a process is supposed to have preceded his declaration, his right to take out process, though he may not be bound to do so, seems to me quite clear; and no other question could be raised upon it, than whether the defendant could not be relieved from the costs of an unnecessary proceeding.

Then if this be so, what is there to prevent the plaintiff from suing outailable process? There is no stipulation that he will not arrest the defendant. A present debt is acknowledged by the *cognovit*; and by the terms of the *cognovit*, which is a mere agreement, the defendant has obtained a stay of execution, that is, an indulgence to himself not necessarily leading to the supposition that the plaintiff either has parted with or meant to part with any of his ordinary rights as a creditor, but it is rather a reason why he should be allowed to retain them.

To be sure the debt is confessed, but there may be other ways of proving it. It does not follow that the plaintiff intends to rely upon the *cognovit*, as his only evidence of debt; if he did, and if there would be any injustice or breach

of faith in his making that use of it, in an action independently commenced, the proper time to restrain him would be when he makes the attempt. We must not anticipate him. But at present I see nothing in this objection.

Our statute of 1822, ch. 2, sec. 14, is clearly not available to the plaintiff in such a case as this. The cognovit is not "*an action pending*," and he cannot sue out an *alias capias* when there has been no prior writ. But might he not sue out common process *nunc pro tunc*. and then take out an *alias capias*, and proceed in the same line of action with his cognovit? If he could, that would be a more convenient course; but I offer no opinion here, as to whether he could or ought to proceed thus. Is he to lose the possibility of arresting a debtor who may be notoriously about to abscond? He might have lost the power by giving credit; as if, instead of taking a cognovit giving no stay of judgment, he had taken a note payable a year afterwards. But how has he lost it here? He retains the right of proceeding immediately to all lengths short of execution, to recover the debt. Why not arrest then, as he may between verdict and judgment?

One reason, and the only one as I think, apparently against it, immediately occurs: the defendant, if arrested and confined for want of bail, may be compelled to lie in goal a year before the plaintiff, according to his cognovit, can take out a *ca. sa.* But would that follow? At present, I think, if the causes of action were clearly shewn to be identical, the plaintiff would be restrained from suing out a *ca. sa.* by the stay of execution in the cognovit. That I admit; but the reasonable consequence from that would seem to be, that the defendant would be enabled on that account to obtain a *supersedeas*. If he could do this, he would suffer no injustice in the case.

But we are not to assume that the necessity for deciding that point would arise in every case. In many it would not, and it might not in this; for we do not know that the time for charging the defendant in execution would arrive before the period limited in the cognovit had expired. The cases of *Daniel v. Dodd*, 8 E. 333; and *Shakspeare v. Phillips*,

8 E. 433 ; seem strongly to confirm this view of the question. I consider the case of *Thomas v. Bail of Graham*, 15 E. 617, and others to the same effect, very unlike the present, and not such as can decide this point; because there an absolute and considerable credit had been given, by which the bail were prevented from rendering, and therefore it was held they were themselves discharged. The bail in that case (15 E. 617), could not have surrendered the principal until default made in paying the instalments, because the plaintiff had expressly stipulated that he would not proceed against the bail until such default; the bail, therefore, not being in the mean time liable themselves, could not render their principle in their *discharge*.

This case is also clearly distinguishable from *Boothby and others v. Lowden*, 3 Camp. N. P. C., 17 c., and all that class of cases.

SHERWOOD, J., concurred with the Chief Justice.—The plaintiff, by the cognovit, has only stipulated to refrain from suing out execution. This cannot deprive him of the right of having the security of bail given by the statute.

MACAULAY, J.—A practice differing from that in England has prevailed here in taking cognovits.

There it was once supposed a confession of judgment must succeed the declaration, and it has always been deemed necessary to precede it with process.—7 Taunt. 702; 1 Moore, 428. The party is supposed to be in court when he confesses the action, which action is supposed to be disclosed in the declaration.—4 B. & A. 91. When a judgment is to be confessed *in limine*, the course is by warrant of attorney authorising an appearance and plea of confession; but with us it has been customary to adopt the form of a cognovit, instead of a warrant of attorney; and the practice may now be considered established, the court having recognized it in the tariff of fees.

The validity of such confessions is, I conceive, founded upon the principle, that process may be taken out at any time *nunc pro tunc*.—1 Chit. R. 268; 8 Price, 513; and I doubt not the court will authorize its issue at any period with a teste antecedent to the confession, if requisite.



If this be the correct view, then it would follow that in the present case, admitting the plaintiff's right to arrest, he should have sued out original process tested before the cognovit, and perhaps have entered common bail for defendant, and then taken out an alias writ to hold the defendant to bail pursuant to the statute; and in such case the affidavit of debt should have been entitled. The action would be pending and confessed. Another light in which the proceedings might possibly be sustained, is to regard the affidavit not entitled, conformably with the rule of court on that head; which provides that affidavits of any cause of action, before process sued out to hold the defendant to bail, be not entitled in any cause. The entitling being omitted, because as yet no process had issued or common bail been filed, and the rule of court being peremptory, I cannot conceive that after accepting a confession in an action, the plaintiff can abandon it and proceed to arrest in another suit, if contrary to the terms thereof. Though it is held that, as a general rule, in England, a plaintiff may, by discontinuing a nonbailable suit, arrest in another subsequently instituted—6 T. R. 616; 1 Chitty, 275; Whiteoak, 72; 8 Price, 513; 13 Pr. 8. But then he is precluded from holding the defendant to bail in the first action *pendente lite*, as allowed here. I, however, am of opinion that the plaintiff cannot legally arrest the defendant at all, until the period fixed by the cognovit for paying the debt has elapsed.

Although until the entry of final judgment a bare confession is no merger of the original demand, yet it is said to be a new modification of the debt.—1 Chit. R. 16. It contains mutual stipulations founded on good consideration.—5 B. & C. 650. A debt being due and payable presently, the defendant, in consideration of time given and with a view to save expense, agrees to confess judgment; in consideration of such admission (which saves the plaintiff the trouble, delay, difficulty and expense of establishing a contested case, at once recognises his claim and places him in a more favorable attitude in every respect, especially when the security of an immediate judgment is, as usual, super-added) the plaintiff consents to postpone the time of pay-

ment. There are mutual advantages; and where stay of execution, which is equivalent to stay of payment, is given, it operates, as respects the right of arresting, to a virtual extension of the credit, analagous to bills or notes payable at a future day accepted for a debt payable presently.

Many of the cases I shall cite arose under confessions payable by instalments, and upon the application of bail; but as respects the present question, it differs not whether, by the terms of the instrument, the debt be payable at once, or in one sum at a future day, or in several sums at several prospective periods. The point in either event is the same, viz., What is the legal effect of a confession giving time or stay of execution, upon the rights of the parties as to arrest? Does it amount to an extension of the credit in respect to execution and process of arrest?

I think agreeing to stay execution is equivalent to granting time for payment. The usual terms of such instruments are, that in case defendant makes default in the payment of the sum specified at a day named, the plaintiff may enter judgment and issue execution, or that he may enter judgment forthwith, and in default of payment at the day take out execution. By accepting such an agreement, the plaintiff tacitly undertakes to stay proceedings, at least all coercive proceedings, or such as have for their object enforcing the demand, of whichailable process is one. It is seeking the highest security for a debt before it is payable, and the court will see the terms of the confession fulfilled.—1 Bl. R. 943; 3 Sal. 214; 1 Sal. 400; 7 Mod. 49; 1 Sel. Pr. 373.

5 T. R. 277.—The taking a cognovit does not discharge the bail (a very short case), and it does not appear that any time was given. 1 Taunt. 159.—A cognovit conditioned for payment by instalments discharges the sheriff.

*Mansfield, C. J.*—"The effect of this instrument was, that "from the time of taking it, the defendant could not be "taken by the sheriff. The bail could not have surrendered "defendant, and if they had, he would have been entitled to "his discharge."—8 E. 433; 15 E. 617.

4 Taunt. 456, S. P.; *Mansfield, C. J.*—"If the defendant  
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“had been surrendered after such cognovit, the court would discharge him.”

*Heath, J.*—“It would be very extraordinary, that if the plaintiff parted with the power of taking the defendant until default made in payment of the instalments, the power of taking him should subsist in the bail.”

*Chambers, J.*—“If the bail were to surrender the principal, they would be discharged in a circuitous way; for no doubt the court would hold the principal entitled to his discharge, *Without time given* it is not a discharge.”—5 Taunt. 319; 1 Mar. 59.

7 Taunt. 126.—Bail not discharged by plaintiff accepting bills, on the understanding that he should not be precluded from proceeding while they were running.

*Gibbs, C. J.*—If the creditor gives time to the principal he cannot during that time take or proceed against him, &c.

4 B. & A. 91; 9 B. & C. 707; 9 B. & C. 422. 2 B. & C. 151; 4 E. 188.—On a question whether a cognovit required a stamp, the court said that it did, and set aside the judgment thereon for irregularity; it appearing that the cognovit contained an agreement to take the debt by instalments, which therefore ought to have been stamped.

Upon the authority of *Ames v. Hill*, 2 B. & P. 150, though a mere cognovit, without any matter of agreement, did not require a stamp.

That the bail are not discharged by a cognovit not extending the time beyond the period at which final judgment could at all events have been obtained, is now settled as a rule of practice.—4 Taunt. 456. When time is given beyond such period, they are absolved unless assenting to be responsible. The reasons why bail are discharged in the latter case, equally apply in favour of the defendant in all cases as respects the question of arrest; and although it is settled that the liability of the bail shall subsist under certain circumstances, it follows that where they remain responsible they still possess the power to render the defendant in discharge of themselves; but it does not follow that after such surrender the court on application would not discharge the defendant out of custody, it being inconsistent that the

plaintiff should be at liberty to hold him imprisoned for a debt which by his own agreement was not payable. The defendant could not be charged in execution ; if insolvent could not procure relief ; and, in short, a variety of inconveniences might accrue, which were suggested in the argument.

If the operation of a cognovit is merely to protract the judgment or execution, or both leaving the parties at full liberty to proceed in all other respects, I do not correctly appreciate its legal effect. I consider it, with a view to an arrest, as amounting to an extension of the credit upon sufficient consideration, and mutually obligatory and binding.

The terms of the confession in this case are disclosed. The period therein limited for payment of the debt, or issue of the execution, had not expired at the time of the affidavit and arrest ; and I consider the case similar to one I will suppose. — was a plaintiff in the King's Bench, in England, to proceed by non-bailable process, and after the defendant had appeared to accept a cognovit, giving time of payment or stay of execution, limited within or extending beyond the time at which judgment and execution might be had, in the event of a contest and trial, and payable in one sum at a fixed day, or in several sums at several days. Could he, before the period arrived for the payment of the whole sum, or such part as first became payable by the conditions of the instrument, which would in case of abatement by death, &c., be evidence of the debt, abandon that suit and begin *de novo* by arresting and holding the defendant to special bail ? In which latter suit, if contested, his only evidence might be the confession. Would a confession, coming due after declaration in the second suit, support plaintiff's case ? Or, should a defendant in custody give a cognovit, payable by instalments, or in one sum at a future day, could the plaintiff, after accepting such confession, continue the defendant in prison, if he applied to be discharged ? I think not. I think such a course would be contrary to the terms which he imposes upon himself by taking the cognovit. That step by his own act would disarm him.

The occasion of the passing and the cases that have arisen under the rules of court requiring the presence of an attorney



on behalf of the defendant, at the execution of warrants of attorney, when such defendant is in custody, apply. — 1 Chitty, 267 (a); 8 D. & R. 56; 2 Stark. 1245; 5 Mod. 144.

2 Str. 1245.—And the rule does not extend to any suits but the one or more in which he is so in custody on mesne process.—1 E. 241, and cases cited there; 7 T. R. 415; 3 T. R. 616; 7 T. R. 19; 2 Taunt. 49, 360. And as to the evil apprehended by the court, it is said (7 T. R. 19, 20), that the rules do not extend to cases where the defendant is in execution, and that the reason of making the rules Car. II. and Geo. II. was to protect parties arrested on mesne process from acts by which, *in consideration of being released from immediate imprisonment, they might subject themselves to the payment of larger sums than were really due from them* — 2 Taunt. 360; Cow. 281; 7 Taunt. 703; 1 Moor. 428.

As to what a cognovit is see 1 Sell. Pr. 372.

The books seem to treat a cognovit *in terms* as a new security or agreement, as a bare plea of confession. It certainly is not such. There is no mutuality, and the defendant may plead it in spite of the plaintiff; and in such event the plaintiff may take immediate judgment and execution. It is only when a defeasance is added thereto, that its character is changed from an absolute to a conditional recognition of the demand. When stay of execution is incorporated as a condition, the plaintiff, by accepting the instrument, assents to such condition; and an agreement to forbear execution is equivalent to, and treated, I think, as an agreement to extend the period of payment, and suspends all coercive proceedings in the interim. The defendant being already in court, the process can only be resorted to as a coercive measure, to add to the security already accepted the additional security of the person before the time has arrived for payment. The case in 2 Str. 1216, where a second arrest was allowed, the bail in the first case being forsworn and worth nothing, is much in favour of an exception to the general opinion I entertain in this case, but it is not shown that the confession here was not *bona fide* on defendant's part, but given *mala fide* for the mere fraudulent purpose of lulling plaintiff's apprehensions and depriving him of the power to arrest;

and in order to enable him, on thus obtaining an extension of time, to elude the demand altogether by absconding. A confession given with such an object might entitle the plaintiff to abandon it on discovering the fraud, but such bad faith is not shewn here. The plaintiff's agent swears that the defendant is indebted (which means for a debt due and payable), and that he apprehended he would leave the province without paying such debt, though not then payable (vide 2 M. & S. 145; 7 Taunt. 171; 3 B. & A. 435; 2 Mar. 483; 4 Moor. 18; 1 D. & R. 148; 7 E. 194; Chitty on Bills, 349; 5 Taunt. 192; 2 B. & C. 61; 3 B. & B. 365; 8 E. 576; 6 Ves. 734; 10 E. 40; Chitty on Bills, 292), and thereupon arrests him. No imputation is cast upon the party making the affidavit, as he only deposed with a view to the original debt. I am merely speaking of the legal effect of it, in my construction of the cognovit, as protracting the credit or time of payment. It is alleged that the defendant has since gone abroad, but that his flight was contemplated when the confession was given; and that it was given as a cloak to further such views, is not satisfactorily made out.

The cases to be met with are not all reconcileable with many general rules touching confessions of judgment, but they seem more or less governed by the nature of the application and the peculiar circumstances. I find none expressly in point either way; and my opinion is no further expressed than that an affidavit of debt, and bailable process and arrest thereon, cannot regularly be resorted to, after the acceptance of a cognovit and stay of execution, until by its terms the debt has become payable.

*Per Cur.*—Rule discharged.

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LE MESURIER V. SMITH.

Action on a limit bond. The declaration set out bond, condition, breach, and assignment by the sheriff, to which several pleas were pleaded, in substance stating that after the breach, and before the bringing of this action, the sheriff had delivered up the bond to the prisoner, who was an obligor, to be cancelled, and that it was cancelled accordingly. *Held*, that the pleas were good; the sheriff having a legal right to give up the bond, rendering himself liable. *Held* also, that a render of prisoner after breach, without cancellation of the bond, does not destroy the right of action.

This was an action of debt brought by the plaintiff, as assignee of the sheriff, on a bond that one Phillips, a prisoner in execution, would not depart from the limits assigned, &c. The declaration set out the bond and condition, and stated a breach thereof in several counts.

The defendant to the 2nd, 3rd, and 4th counts, pleaded several pleas; and to the whole declaration, in his 6th and 7th pleas, he pleaded in substance as follows:—That before the sheriff executed the assignment stated in the declaration, and before the commencement of this suit, Phillips had been surrendered to the sheriff, and received and kept by him in close custody; and that thereupon the sheriff gave up the bond to the defendant to be cancelled and annulled, and that the said bond was with the knowledge and consent of the sheriff. To these pleas the defendant demurred.

*Cassady*, for the demurrer, argued.—It is necessary, in a plea, either to confess or avoid the material facts stated in the declaration. Now in this declaration the making of the bond is stated, together with the breach, and these facts are not denied, nor is there any sufficient plea in avoidance of them.—1 Chitty, 509-10; 1 Willis, 55; Plowd. 46. It appears, from the pleadings, that the fact of the departure of Phillips from the limits took place before the render to the sheriff and the alleged cancelling the bond. Now, after the breach of this bond, another person than the sheriff, namely, the plaintiff in the original action, became entitled to the bond, which the sheriff thenceforward held as an agent or trustee for him, and for his interest and security alone; in which bond the sheriff had no interest, and over which he had no control, and which he was bound to assign on demand. Can it be said that the sheriff, either by collusion with a prisoner who has broken the limits, or deceived by such prisoner, in case the sheriff was ignorant of the breach of the bond, can divest himself of the duty cast upon him by the legislature, of taking care of this bond for the plaintiff? In case of collusion of the sheriff with the obligor, the act of cancellation would be void, like any other fraudulent act; and in case the sheriff was deceived, and was not aware of the breach of the bond, the case would be doubly hard, for

then the fraudulent obligors would be freed, and the sheriff (who, unless he were to watch the prisoner on the limits night and day, could not be aware of the breach of the bond) would be liable. In both these cases the act of cancellation must be adjudged fraudulent and void. The case of *Evans v. Shaw* (Draper's Reports, 14,) in principle supports this demurrer; for though in that case the sheriff did not actually give up the bond, yet he received the prisoner into custody. In case there has been no breach, the sheriff is bound by the express words of the statute to give up the bond. In that case, had there been no breach, he would have been liable in some way for not giving it up. But he cannot tell whether a breach had been committed. How and when therefore is he to comply with the words of the statute, and expose himself to a ruinous liability? Either the words of the statute requiring the sheriff to give the bond must be held void, and not at all obligatory on him, or they must be held to offer a reward to the commission of a fraud, of all others the most easily perpetrated, namely, the surrender of the prisoner and demand of the bond after breach.

It may be said that by demurrer the fact and legality of the cancellation is admitted, being stated and not denied in fact; but the legal cancellation of the bond is a matter of legal inference from facts stated in pleading, and all the facts necessary to support such inference must be stated, and no facts contradicting it can be stated without subjecting the pleading to demurrer. Therefore if it be true that the sheriff could not legally give up the bond to be cancelled, the statement that he did so must be bad upon demurrer. The defendant has pleaded this fact also as an accord and satisfaction, which it is plain is no plea in debt on bond.—1 Com. Dig. Record (a)2; Roll, 455; 1 Chitty, 4; 3 E. 251; Cro. El. 432; 2 Com. Dig. ; 9 Co. 79; 1 Rol. 455; Cro. El. 46.

*Solicitor-General contra.*—The true question to be decided in this case is very simple. It is, whether the sheriff, who is the legal obligee, can give this bond up to be cancelled, and whether on its being given up and cancelled it does not become void. The bond is taken for the indemnity of the



sheriff, in case of any demand or action against him in consequence of a prisoner's escape. Until an assignment, the sheriff is responsible, and is always considered in law as able to pay and answer all demands upon him. If he give up his indemnity, which is assignable to the plaintiff, and it happens that it is cancelled, he loses the use of it, and must answer the escape himself. Suppose the case of a bail-bond. Surely if the sheriff give it up to be cancelled before assignment, the obligors are discharged. The two cases are precisely parallel, and the principle is too clear to bear argument. The bond being cancelled could not afterwards be assigned.

ROBINSON, C. J.—The defendant in our opinion is clearly entitled to judgment upon all these demurrers. The only question is, whether the sheriff, by executing an assignment of a bond which he once held as security for the goal limits, can give to the assignee a right to sue upon it as a subsisting bond, although before the assignment he had received the original debtor into custody, and had thereupon given up the bond to be cancelled, and the bond had been actually cancelled and annulled with the assent of the sheriff, the obligee.

The bond is here admitted to have been "*cancelled and annulled*," before any assignment; and it would seem at first view utterly absurd to contend, that the assignment of a bond that was "*cancelled and null*" can convey a right to sue upon it, as a bond still valid and subsisting. But it is contended that as the declaration sets out a departure from the limits, that not being denied by the pleas, must be taken to be true; and as this departure must in the nature of things be taken to have happened before Phillips was surrendered to close custody, and the cancelling of the bond is not stated to have occurred until after the surrender, we must therefore see plainly, from the count and plea together, that the bond had been forfeited before it was assigned; and it is urged that the condition being broken, the plaintiff, Le Mesurier, even before assignment, must be considered as the person entitled to the benefit of this bond, and that so strictly, that the sheriff could not intervene in such a manner as to defeat his remedy; but that the bond, though actually destroyed

by the assent of the sheriff, is not legally cancelled and annulled, but must be regarded as subsisting for the purpose of this action; in short, that the defendant, in stating it to be cancelled and annulled, has drawn an unwarrantable inference of law from the facts; and that by demurring, the plaintiff only admits the facts of an actual destruction of the visible instrument, but does not admit what he now contends against, that destruction under such circumstances can amount to "a cancelling or annulling." The plaintiff must be understood to contend this, or no ground is given for an argument; because if the statement in the plea, that the bond is *cancelled and annulled*, be rendered conclusive upon the plaintiff upon demurrer, there is an end of the question.

Admitting that it is open to the plaintiff to argue the question upon this footing, it seems to us nevertheless clear that he must fail; for we think that the giving up the bond by the sheriff, the obligee, to be cancelled by Phillips, the obligor, and the cancelling it by Phillips before any assignment of it had been made, did actually annul the instrument and cancel it in law, so that nothing remained to be assigned.

We do not indeed see upon what principle of law or reason the contrary can be maintained. The case of *Shaw v. Evans & Atkinson* (Draper's Reports, K.B., 14,) is no authority in favour of this plaintiff. The question there made was, whether the sheriff's having received the debtor into custody, after the bond had been forfeited and before assignment, would not operate to prevent the plaintiff from suing upon it, though it was afterwards assigned to him.

A majority of the court were of opinion that it could not have that effect; that the condition being broken, the bond had become absolute, and the right of action had accrued to the sheriff; which right he had assigned as the statute enabled him to do, and the court saw nothing in the facts pleaded to bar recovery upon the bond.

But there the bond had never been cancelled. The whole extent of that case is, to decide that a surrender to the sheriff after the bond broken, will not bar the remedy upon the bond; and that the right to that remedy may, after the surrender, be assigned by the sheriff. There the bond was in

existence, to be assigned by the sheriff as the statute required; here it had been actually destroyed, with the assent of the sheriff; and the only question is, whether after that, it can be recognized as still subsisting and capable of being assigned.

We do not see upon what pretence it can be denied that the sheriff can cancel this bond, or assent to its being cancelled. After he had assigned it, then indeed, by the 6th clause of the statute, the sheriff would be disabled from releasing the action, and thereby defeating the remedy of the assignee upon it. But could he not release the obligors before the assignment? The very insertion of this provision in the statute implies that he could. The bond was taken for his security. He might have waived taking any, and might still have allowed to the debtor, the benefit of the limits, not incurring thereby any liability for an escape so long as the debtor did not go beyond them. His taking the bond is within his own discretion; and it is equally within the option of the plaintiff in the original action, whether to demand an assignment of the bond or take his recourse against the sheriff.

How then can the plaintiff be said to have an absolute legal interest in the bond taken in the name of the sheriff; which bond the sheriff might have taken or not as he pleased, and which (after he had taken it) might be rejected by the plaintiff, and left to stand as an indemnity to the sheriff, according to its terms?

And further, although the act provides that the sheriff shall be bound to assign the bond to the plaintiff, if required, still it is plain the sheriff may refuse to assign; and then the only remedy is an action against him for not assigning. The bond could not be treated as if it were assigned, nor could the plaintiff assert any legal right in it. It would doubtless remain available to the sheriff, and to him only. Until assignment, the sheriff, as obligee, necessarily retains the legal control over it; he could, doubtless, release it and bar himself of any recovery upon it, even after he had put it in suit.

Upon no legal principle could it be denied that he pos-  
( 484 B. )

sessed this power; and if so, then surely he could equally surrender his right by what the law deems tantamount to a voluntary cancelling of the instrument. By such an act the plaintiff is not injured—because there was no obligation on the sheriff to take any bond, and then none could have been assigned. It may, indeed, be truly urged, that when the condition had been broken, the plaintiff had a right to call upon the sheriff to assign the bond: but it is equally true that the sheriff might refuse to assign it; and that in consequence of such refusal the creditor could have no remedy on his bond: and how is the reason of the case varied, if the sheriff disables himself from assigning by cancelling the bond, in which he alone at the time has a legal interest. In the case of *Evans v. Shaw*, if the sheriff had either cancelled or released the bond, or allowed it to be actually cancelled, the case would have stood on a different footing. It was indeed contended that the allegation, that the sheriff had received the debtor into custody, in satisfaction of the bond, and according to the statute (7 Geo. IV. ch. 7,) was equivalent to an averment that he had cancelled the bond, or rather that the effect of the one must be as decisive as of the other: but independently of this being an averment of satisfaction of a *bond*, by a collateral thing, after the condition broken, and not a plea of satisfaction of damages for the breach of the condition, it is plain the defendant there by the terms of his plea relied upon the surrender, as being made under the statute, and as having the effect of discharging the bond, by virtue of the statute which was precisely the point in judgment, and which the court determined not to be the intention or effect of the act. It was not adjudged in that case, that the sheriff could not after the breach and before the assignment, have discharged the obligor, but that the render of the debtor after the breach of the condition was not authorized by the statute, and did not discharge the obligor; and if it had been insisted upon that the person of the debtor was accepted by the sheriff, in full satisfaction of the bond, and that such satisfaction was sufficiently alleged, still after breach, that could be no bar of the action on the bond, although it might have been pleaded in discharge of the condition.



SHERWOOD, J., concurred with the Chief Justice.

MACAULAY, J.—The question in this case is, whether if after an escape from the limits by a debtor, the sheriff accept him from his sureties, and thereupon give up the bond taken from such sureties to be cancelled, and which bond is cancelled accordingly with his assent, he the sheriff can afterwards assign such bond to the plaintiff in the action, so as to enable the latter to prosecute such sureties thereon, by reason of the departure and breach of the condition of the obligation.

Doubtless, a bond before or after a breach of the condition, may be delivered up to be cancelled, by which it becomes void and extinct.—2 Bl. Com. 309; Shep. Touch. 70; Cro. El. 483, 723; Cro. Jac. 255; 6 E. 86; 1 Vent. 297; Dixon on Deeds, 587; and cases cited in *Bank of U. C. v. Widmer* (ante).

It follows that the bond in the present case was annulled by cancellation, so that it no longer subsisted, and not subsisting it could not be assigned. The sheriff disabled himself from assigning, by delivering up the bond to be cancelled, and by reason of its cancellation with his assent.

This does not fall within the case of *Evans v. Shaw*; there the bond subsisted and was duly assigned, and the question was, whether a render by the sureties and acceptance by the sheriff, after a breach of the condition, discharged the bond, so that the original plaintiff could not enforce the same. I do not perceive anything in the language of the court, upon that occasion, that supports the present case; had the bond not been cancelled, but assigned during its existence, then the plaintiff's right of action would remain, notwithstanding render and acceptance of the sheriff. The plaintiff cannot sustain a suit against the sureties unless the bond is assigned and if the sheriff refuse to assign, or puts it out of his power to do so, the plaintiff's remedy is against him; he can acquire none against the sureties.

*Per Cur.*—Judgment for the defendant.

## DOE ON THE DEMISE OF NELLIS V. MATLOCK.

A deed must be considered fraudulent and void against a conveyance subsequently executed, where the former is not registered, and the latter is; notwithstanding the first deed has been obtained by artifice and fraud from the first vendee, and so the registry prevented.

The case, as stated by the Chief Justice in delivering the judgment of the court, and on Mr. Justice Macaulay's notes, was as follows :

The king, by letters patent, granted the premises in question to one Peter O'Karr, in 1798. Karr conveyed in fee to Caleb Matlock : Caleb Matlock conveyed in fee to Caleb Matlock, junior, 27th December, 1824 : Caleb Matlock, junior, conveyed in fee to the lessor of the plaintiff, 23rd May, 1828. This formed the title of the lessor of the plaintiff. For the defendant it was proved, that Caleb Matlock, senior, on the 27th March, 1824, made a deed of the premises in fee simple to his eldest son, Benjamin Matlock (the defendant), for a consideration of 500*l.*, which had been received in part and a bond given for the residue. This deed was not produced ; it was proved to have been executed by Jones, a subscribing witness, who further proved that when the deed was executed the defendant was not present, and that Caleb Matlock, senior, placed it in the hands of the witness as a sort of agent ; the witness drew a bond, to be executed by the defendant as a part of the consideration ; this bond the defendant executed, after the deed was made by his father. It was a bond in a penalty, to maintain the defendant's father during his life.

In the summer afterwards, Caleb Matlock, junior, called on witness for the deed, saying the defendant had sent him for it, that he wished to have it registered. Jones in consequence drew up a memorial, which the old man executed, and he took it and the deed away with him, saying that he would deliver them to the defendant. Some time after, the defendant came to Jones to enquire for the deed, and learnt that it had been given to his father ; at which he expressed his regret, saying he was afraid his brother Caleb had burnt it.

There was evidence that *Caleb the son had used persuasion* to induce the old man to get back the deed he had placed in

Jones's hands, and that he had destroyed it after his father had procured it and given it to him, not without some anxious enquiries whether by such an act he would subject himself to any serious punishment, and seeming to justify it under the idea that the deed was of no value, not being registered.

On the other hand it was proved, that when the father made this deed to Caleb, he was strong in his intellects, knowing perfectly well what he was doing. He seems to have made use of artifice to get the deed into his possession. He justified his making the second deed on the ground that Benjamin (the defendant) had not used him well; and on the advice of a friend, he took back from Caleb a lease of the farm for his life. The father died in the spring of 1825.

On this evidence the judge directed a verdict for plaintiff, and desired the jury to find whether Caleb Matlock, junior, procured the old man to get back the deed he had given to defendant, and to convey the land to him, by using undue influence over him, such as, considering his advanced age, amounted to a species of coercion, though it went no further than persuasion, teasing, importunity, &c., and, if they found this fact, then to find the deed to Benjamin *fraudulently* destroyed by Caleb or through his means: in which case a verdict was to be entered for the defendant, if the court should think such a defence available against a *bona fide* purchaser from Caleb without notice. The judge further intimated to the jury, that he did not think the evidence established such a case of coercion. They found for the plaintiff; and they found further, that the deed to Benjamin was fraudulently destroyed.

*Draper*, in Michaelmas Term, moved for a rule to shew cause why the verdict should not be entered for the defendant upon this finding of the jury, and a rule *nisi* was granted.

In Hilary Term, the *Solicitor-General* shewed cause.—He relied upon the express words of the Registry Act, that the previous conveyance should be held fraudulent and void against the subsequent one previously registered; the want of proof to negative the valuable consideration expressed in the deed to the plaintiff, and of any notice to the lessor of

the plaintiff of a previous conveyance; and also on the slight evidence on which the finding of the jury was founded, with respect to the fraud.

ROBINSON, C. J., in this term, delivered the opinion of the court.

Upon the whole facts of the case, I do not see what room there is for doubt. I take it to be admitted in the argument though it does not appear upon the judge's notes, that the deed from O'Karr, the grantee of the crown, to Caleb Matlock, senior, was registered in the county registry. The provisions of the Registry Act, therefore, attach with respect to all subsequent dispositions of this estate; and then it stands thus: Caleb Matlock, junior, the subsequent purchaser, has registered his deed, while the deed to Benjamin has never been registered. The latter therefore, by the express provision of the act, is to be postponed, though executed first, or rather, to be deemed fraudulent and void as against a subsequent purchaser. What is there to make this case an exception from the general operation of the act? There is no proof of notice to the lessor of the plaintiff, who is therefore an innocent purchaser for a valuable consideration; and if we are to admit that Caleb Matlock, junior, who took the subsequent conveyance, had notice (as it is pretty clear he had), still that, it has been settled, cannot avail in a court of law, whatever ground it may lay for relief in equity.

Then we are to enquire, 1st, whether there is any evidence of such fraud as can make the deed to Caleb the younger absolutely void; and if so, whether the case is altered by the estate having subsequently come into the hands of a *bona fide* purchaser without notice.

I do not know upon what ground this second deed can be held to be void. It is not proved to have been a voluntary conveyance, certainly not more so than the first deed, which had been given to a present defendant. It is expressed to be upon good consideration, and that is not disproved: on the contrary, a present consideration was proved, and for the residue a bond to maintain the father is stated to have been given, though that perhaps was not strictly legal evidence.



The first deed is not proved to have been delivered to the bargainee, but seems rather to have been left in the hands of a third person till some collateral act should be performed. If, however, it were fully delivered, and the deed did not continue under the control of the grantor, why did the grantee omit to have it registered? and how shall he be saved from the consequence of such omission, at the expense of an innocent purchaser who has confided in the appearance of a registered title? *Vigilantibus et non dormientibus servat lex.*

There is good reason to suspect a dishonest intention in the old man and Caleb, junior, to the prejudice of Benjamin; but so there is a dishonest intention always, and it is always a dishonest act, in a vendor to sell his estate a second time when he has been once paid for it; and it is dishonest in a vendee to purchase when such wrong is intended, and to avail himself of the Registry Act to effect the contrivance. Nevertheless, such subsequent sale is valid in law under these circumstances, if the deed is first registered; and why not here? It may be granted that the old man had no good reason for wishing to recall his first deed, still he might do it by the use of the Registry Act; and his getting up by artifice his first deed, cannot vary the case, since he could just as well have made his second deed without that, and the effect would have been the same.

That deed having been destroyed, it not only never has been registered, but it now never can be; and how can we regard a title as vested in Benjamin under a deed of which we do not know the contents, further than by that general description which would shew it to be such a deed as can have no validity until enrolled.

I can conceive no ground for holding the deed to be void as against Benjamin's title as heir-at-law, because a mere voluntary conveyance would be sufficient to prevent the descent, and this is not proved to have been a voluntary conveyance; besides the statutes 13th and 27th of Elizabeth save the rights of innocent purchasers.

Upon the plain effect of the Registry Act, I think the lessor of the plaintiff must succeed. He has purchased from Caleb, who had a registered conveyance from his father, who

held under a registered title, and nothing intermediate appears in the register.

If therefore Caleb, senior, when he conveyed, had the power to convey, his second deed must have effect, notwithstanding the first. He had the power, because he had not divested himself by any deed which we can notice consistently with our Register Act; and if once we can allow ourselves to look into the reasons why the prior deed has not been registered, our Register Act becomes a nullity.

*Per Cur.*—Judgment for the lessor of the plaintiff.

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### MCPHERSON ET AL. V. BAIL OF MOSIER.

The Court will not extend the time to bail to surrender their principal, further than is directed by the rule 1st Anne. Bail are absolutely fixed, after eight days have elapsed in full term from the return of process against themselves.

The defendants having become bail, and judgment having been rendered against the principal, they were sued in debt on the recognizance, the process being returnable the first day of Hilary Term, 6th February.

The *Solicitor-General* moved this term for a *habeas corpus* to bring up the body of the defendant Mosier, for the purpose of rendering him to the sheriff of the Johnstown District in discharge of his bail—the said Mosier being a prisoner on mesne process in the District of Niagara. He argued that the prisoner and his bail were entitled to this indulgence, because at the time when the bail might by law have surrendered him he was in custody for a very large sum in another district. The bail could not be expected to take him out of that custody. They were prevented by the law itself from fulfilling the terms of the recognizance; and now, although late, the court, he thought, would relieve them.

After taking time to consider, ROBINSON, C. J., delivered the opinion of the court.

I should be happy if any authority could be found that would warrant us in acceding to this application; for the bail may have been very properly fixed with a large debt from ignorance of the strict requisition of the law under the circumstances of the case; but in matters of this kind we

have not a discretion to go beyond all rules and precedents—the established practice must govern us, or the plaintiff could feel no security.

The facts are, that the defendants having become bail of Mosier, and judgment having been rendered against him, they were sued in debt on the recognizance, and the process against them was returnable on the 6th February (first of Hilary Term). They might, I think, have surrendered the principal on the 14th of that month, under the rule of court 1 Anne, which orders “that bail impleaded in debt upon “their recognizance, shall have liberty to render their principal by the space of *eight entire days* in full term next “after the return of the writ of latitat or other process sued “out against such bail.” Not having done this, they are fixed; and they now move, nevertheless, for a *habeas corpus* to bring up the prisoner, in order to render him in their discharge—shewing that Mosier on the 9th of February, was arrested at the suit of one Tannahill, and committed on mesne process to the goal of the District of Niagara, where he yet remains. But, first, if the bail chose to neglect all precaution for their own security, and to take no notice of the process served on them until the latest moment, they still had from the 9th to the 14th to move for a *habeas corpus* to bring him up in order to be surrendered.

Secondly, If they had been so situated that indulgence as to time was necessary, they ought to have moved for that indulgence before they were fixed with the debt, and not have lain by until their recognizance was forfeited.

Thirdly, If under the circumstances, notwithstanding their remissness in both these respects, they could afterwards receive relief, they have suffered a whole vacation to elapse without moving for a *habeas corpus*, which if it could be granted at all for the purpose of rendering the principal, could be granted as well by a judge in vacation, as by the court; they have foregone every proceeding that could have helped them, and have even pleaded to the action against them.

The following authorities will shew clearly, that if we were to allow this principal to be now rendered and discharged by

the bail, we should do what never has been done before, and what cannot be done consistently with the established practice. Some of these cases are cited merely to shew how rigid the court are in general in holding the bail to their undertaking.—Lord Raym. 156, 721; Bur. 2034; 7 T. R. 226; 3 E. 145; 14 E. 537; 4 E. 102; 13 E. 355; 16 E. 389.

The *habeas corpus* was accordingly refused.

### MCMILLAN V. FAIRFIELD.

The Court will not set aside a verdict for the plaintiff where the justice of the case appears strongly with him, merely because there was at the trial a preponderating weight of evidence on the part of the defendant in support of a plea of the Statute of Limitations.

This was an action of assumpsit on the common counts for money, goods, &c.

Plea.—The general issue and Statute of Limitations.

Replication.—That at the time of the accruing of the causes of action, &c., defendant was not in the province but resided in the United States of America; and that the writ, &c., was sued out within six years after his first return.

Rejoinder.—That it was not sued out within six years after the defendant's first return, and on this issue was joined.

At the trial it was proved, that in the year 1812 the defendant was seen in the province openly transacting business as a timber merchant, and that the plaintiff, in the opinion of the witnesses, might have served him with process; that he did not hide himself, but on the contrary appeared to transact his business publicly, and that he remained in the province ten months.

The judge directed the jury that it was not necessary for the defendant to prove a fixed residence in the province; that it was enough for him to prove that with reasonable diligence the plaintiff had a fair opportunity of arresting him or serving him with process. The case was left to the jury on the evidence, and they returned a verdict for the plaintiff.

*Bidwell*, in Michaelmas Term, produced an affidavit of the defendant, denying the debt and affirming the evidence as to



his residence in the province; and also several other affidavits confirmatory of the same evidence as to the return of the defendant in 1812; and on his motion a rule to shew cause was granted, "why the verdict should not be set aside and a new trial granted, the verdict being contrary to law and evidence." This rule was enlarged, and in Hilary Term the *Solicitor-General* shewed cause against it, and *Bidwell* was heard in reply.

The remarks of counsel were principally directed to the merits of the case, and the relative strength of the evidence.

In this term *Robinson, C. J.*, delivered the opinion of the court.

We have had some hesitation in this case, but are all clearly of opinion, that the verdict should not be set aside.

That the plaintiff had at one time a good cause of action against the defendant, is proved by three witnesses. The claim was definite in its nature, and arising out of a single transaction, and capable of being easily disproved, if it were fictitious, by the testimony of a witness of whose place of residence the defendant himself shews that he was fully aware.

The Statute of Limitations was relied upon for barring a demand just and simple in itself; and as the time of limitation had long since expired, the only question capable of being raised on this record was, whether the plaintiff was not within the saving of the Statute of Limitations on account of the residence of the defendant abroad. That the defendant resided abroad at the time the debt was contracted is clear; and the enquiry to be made was, whether he had returned to this province more than six years next before the commencement of this suit, so that the plaintiff might have pursued his remedy.

The evidence of his return was submitted to the jury; they were told that he was clearly proved to have been within this province; but it was contended that he had not been openly resident here, so that the plaintiff could be presumed to have an opportunity of arresting or serving him with process.

On this point the jury were directed, that to have a settled

residence as a householder was not necessary ; so far the direction was favourable to the defendant. They were further told, that it appeared reasonable to require satisfactory evidence that the defendant had been within this province under such circumstances that the plaintiff might have known the fact and taken his remedy against him. Whether this was made out was left to the jury, with an expression of opinion that the evidence as to that point preponderated in favour of the defendant ; and they were told that if they thought so they should find for the defendant, however hard they might think it that the plaintiff should lose his debt.

There was clearly therefore no misdirection, and the defendant has not complained that there was. The jury have given their verdict reasonably and fairly in respect to amount ; and, under all the circumstances, to give the defendant another chance of urging rather an unconscientious defence to an apparently honest debt, would be exercising our discretion in a manner not consistent with the principles which regulate new trials.

The decisions reported—1 Bur. 11, 54 ; 3 Bur. 1306 ; 2 Salk. 653, 644, 648 ; 4 T.R. 668 ; 2 Wils. 302, 362, and many others, seems to us to leave no doubt as to the propriety of declining to disturb this verdict.

The affidavit which the defendant has made, tends strongly to convince us that the justice of the case is with the plaintiff.

The rule is therefore discharged.

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#### HUGILL V. MCCARTHY AND DAVIDSON.

It is not a good ground for setting aside or staying proceedings on *fi. fa.* against bail, "that the *ca. sa* against the principal has not been filed."

*Geo. Boulton* moved for a rule to shew cause why the judgment on *sci. fa.* against the bail should not be set aside, on the grounds mentioned hereinafter by the Chief Justice. The rule having been granted, the case was afterwards argued, by *Small*, for the plaintiff, and *Sullivan*, for the defendants.

ROBINSON, C. J., delivered the opinion of the court.

The irregularities objected are—

1st, That the bail was not put in till the 23rd Nov., 1830.

( 495 B. )

though the declaration was filed the 3rd of July, 1830; and that the declaration was a waiver of bail.—3 B. & A. 212.

But this ground is mistaken. The action was commenced by common process, and bail was not required till after the plaintiff had declared.

2ndly, That a *cognovit* was given by Driscoll, and judgment entered thereon 30th November, 1830.

It is admitted, however, that the *cognovit* gave no stay of judgment or execution; and consequently the bail have no pretence to be relieved on that score.

3rdly, That although a *ca. sa.* issued immediately after judgment, it was not returned; that an *alias ca. sa.* has issued and has been returned *non est inventus*, but has never yet been *filed* in the crown office. So that it does not appear that Driscoll, the principal, did not render himself to the custody of the sheriff, &c. Judgment has been entered on the *scire facias*, and returned *nihil*.

The only question is upon the third objection. The case of *Hunt v. Cox*, 3 Bur. 1360, is against this application. It is expressly determined there, that the court will not set aside (or stay) proceedings against bail, on the ground that a *ca. sa.* against the principal was not returned and filed before *sci. fa.* sued out. The leaving it in the sheriff's office, they say, was a notice to the bail, and they ought to have searched; and besides, if the defendants had pleaded to the *sci. fa.* that no *ca. sa.* had been filed and returned, the court would have ordered it to be filed before replication.

The same case is much better reported in 1 W. Bl. 393; in which Lord Mansfield expressly says the filing is mere matter of form; and Dennison, J., that both the return and filing are mere matter of form. The *ca. sa.* lying in the office is the material step; and a case is cited by Norton in argument (*Lutwich*, 1273) to the same effect; in which the court said, the not filing the *ca. sa.* returned is not an irregularity for which to set aside proceedings.—Vide also, 1 Levins, 225.

If the not filing the *ca. sa.* could have been pleaded as a defence, the defendants have had the opportunity. Two writs of *scire facias* have been regularly sued out and

returned *non est inventus*, which we must regard as equivalent to a *scire feci*, and the bail are not to omit all means of informing themselves of the proceedings that are going on.

On the affidavits filed, I see no ground for interposing, and therefore think the rule must be discharged with costs.

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REX, ON THE PROSECUTION OF THE ATTORNEY-GENERAL  
V. MACKINTOSH.

The court will construe a penal statute according to its spirit, and the principles of natural justice; and there are cases that may possibly arise in which, although a person *according to the letter* of the act may be liable to the penalty, yet the court will direct the jury to acquit him, he not having offended against its spirit and intention.

A rule nisi having been granted last Michaelmas Term, to shew cause why the verdict in this cause should not be set aside, and a new trial granted, the verdict being contrary to law and evidence, and for misdirection, and the rule having been enlarged till this term, the matter was argued.

The Chief Justice stated the case and proceedings at the assizes, as follows:

This was an information filed in the name of the Attorney General, for a penalty of 100*l.*, under the 51st sec. of the imperial stat. 6 Geo. 4, ch. 114, which enacts “that all vessels, “carriages, &c., made use of in the removal of any goods “liable to forfeiture under that act, shall be forfeited, and “*that every person who shall assist or be otherwise concerned in the “re-shipping, landing or removal, or in the harbouring of such “goods, or into whose hands or possession the same shall knowingly “come, shall forfeit the treble value thereof, or the penalty of 100*l.*, “at the election of the officers of the customs.*”

Upon the trial, the Attorney-General called the master of the vessel to prove, that he had at the request of the defendant landed some salt and tobacco, at a place not a port of entry; and that the defendant had been concerned in the unshipping, landing and removal of these goods. The witness, who was evidently reluctant and required pressing to declare what he knew, stated nevertheless very distinctly, that he had at the request of the defendant landed 150 barrels of salt at a place in the district of Newcastle, which was not



a port of entry ; and he stated at the same time conversations that he had had with the collector of customs at York, and admissions which that officer had made to him, for the purpose of leading the jury to think (what the witness evidently desired to deliver as his opinion), that the defendant had done nothing intentionally wrong, and had no wish or design to evade the payment of duties, but on the contrary had acted in good faith, upon an understanding openly come to by him with the collector in question. This evidence was given by the witness for the crown upon his examination in chief, he was cross-questioned by the defendant's counsel upon the whole of his statement, and re-examined for the crown upon that cross-examination.

However much the Attorney-General might think, or might mean to contend, that such testimony proved nothing that could exempt the defendant from this penalty, or did not prove anything sufficiently, he did not object that this testimony, which came from his own witness and not upon cross-examination, was illegally received, as being wholly irrelevant to the point in issue. On the contrary he called the collector, who was said to have made these statements to his first witness, for the purpose of disproving them, and in my opinion the collector did disprove them.

After the Attorney-General had closed his case, the defendant's counsel replied, insisting upon it, that in all the defendant had done he had acted innocently, without intending to evade payment of duties, or infringe the revenue laws, for that he had done nothing but upon an express understanding and permission of the collector, and that to make him pay a penalty in such a case would be highly unjust ; he called no witnesses, and therefore the case rested entirely upon the evidence for the crown.

The Attorney-General claimed a right to reply, which the defendant resisted, as he had called no evidence ; I thought the Attorney-General had the right and allowed it, but I confess not without some doubt. In his reply the Attorney-General made no comment upon the evidence, and did not address himself to the jury upon the particular features of the case, but reading from the record the issues to be tried, he

contended shortly but positively, that the jury had nothing to enquire of, but whether these goods were liable to forfeiture, and whether the defendant had been concerned in the unloading or removing them; that his knowledge or intentions were wholly immaterial, no matter what permission he had or may have thought he had from the collector; in short, that the penalty inevitably followed the facts of this case, either as alleged or proved, and no argument was raised upon the weakness or insufficiency of these particular facts.

In summing up to the jury, after explaining to them particularly the propriety and necessity of enforcing the laws made for the prevention of smuggling, I read the section of the statute; I then remarked upon the principles which the Attorney-General contended for, namely, that the statute must necessarily be enforced according to its strict letter, without regard to any circumstances shewing with what intent and under what circumstances the defendant did the act imputed to him, and I told the jury that I did not concur in that opinion; that on the contrary I could suppose many cases, in which to charge the defendant with a penalty, though it might be supported by the letter of the clause, would be so decidedly contrary to natural justice, and to the spirit in which our criminal laws are administered, that a judge would feel it his duty to direct the jury, that the defendant had committed no offence against the spirit and intention of the act, and having done no wrong was therefore subject to no penalty; and I think I stated some cases, probably extreme cases, by way of illustration. In any such case, I added, I should feel it right to direct the jury to acquit, and certainly should do so until I found from authority that I was wrong.

It was contended for the crown, that as in this particular branch of the clause (6 Geo. IV. ch. 114, sec. 51), the word *knowingly* was omitted, though it was used in the next line with respect to persons having smuggled goods in their possession, it was clear that knowledge or intention were wholly immaterial, as to persons charged with removing smuggled goods. But I doubted, and still doubt that. My inclination is to think it material in the one case as well as in the other, but I do not consider, and did not at the trial,

that to prove guilty knowledge or intention was a necessary part of the case; I thought the jury were to consider the facts on this trial, as the witnesses for the crown laid them before them, for no witnesses were called for the defendant, and if indeed they had shewn to the entire satisfaction of the jury that the person removing the goods had done so innocently, I should have thought they did right in acquitting.

I made these general remarks at the trial, because the law was rested on general principles of construction, which were contended to be too rigid to bend to any circumstances and it was evidently expected that I would confirm what was contended, and recognize that as the law of the land, which I could not do, because that was not my opinion, and is not now.

On the facts and merits of the particular case then trying, I did not differ from the view in which it was placed on the part of the crown, and after having expressed myself in regard to the general construction and effect of the act, I reminded the jury that they were to consider what were the facts of this case; and I expressed a strong and decided impression, that they were not such as could entitle the defendant to a verdict; I observed that the master, the only witness that had attempted to prove it, had stated a case that in my opinion could not justify the defendant, for according to his own evidence, the defendant had acted inconsistently with the understanding he had pretended, for he had not shewn that he had delivered to the collector of Port Hope the letter which the collector of York had written to him, and he had of course brought back no answer, and instead of reporting his goods at any port, he had landed them in such a manner that the collector was not privy to it, nor had any opportunity of observing whether he was acting honestly or fraudulently. Having shewn that the evidence of the master was in itself not sufficient, I next reminded the jury that (such as it was) it was wholly contradicted by the collector, whose conduct had been called in question, and that the very reason of the thing, and the circumstances themselves, strongly corroborated the collector's account of the transaction; with these expressions of my opinion as to

the evidence, I left the case with the jury, and they found a verdict for defendant, which certainly was contrary to the charge.

*Washburn* shewed cause against the rule.

It cannot be pretended that the charge of the judge at nisi prius was in favour of the defendant; it seemed to me peculiarly strong against him, for though the Chief Justice did not then agree with the Attorney-General, that every landing of goods through misfortune, stress of weather, ignorance, or of agreement with the custom-house officer, rendered a person assisting liable to a penalty, yet his lordship carefully excluded this case from the favourable consideration which these circumstances might possibly entitle a defendant to claim of a jury.

The Attorney-General did not deny but that the facts would have been sufficient for the acquittal of the defendant, if any facts could be adduced in his excuse, after his assistance in the landing of the goods, contrary to the express letter of the act, had once been established. His lordship on the contrary fully explained to the jury, that in his view, the evidence was not sufficiently favourable to the defendant to warrant the jury in finding a verdict for the defendant.

The doctrine set up by the Attorney-General was carried by him to a length, which would make the revenue laws an intolerable burthen; he would allow no explanation to be proved, no motives to appear; the stranger who might accidentally be present when goods were removed, the contraband nature of which he had no possibility of knowing, and who might assist in their removal perhaps to save them from destruction and loss, would be equally guilty with the man who deliberately smuggles; there are no decisions to bear out this severe construction; the utmost rigour which the law can in this case be supposed to possess, more than in the instance mentioned, where the word "knowingly" is introduced into the statute, is to oblige the defendant to prove the negative, that he did not knowingly infringe the law or contravene the provisions of the statute, instead of its being incumbent on the crown to prove the "*scienter*," and the intention of the party charged to defraud the revenue.

The courts, in criminal cases—and this is a case of that



nature—do not look narrowly into the grounds of a verdict of acquittal; the master of the vessel, who knew all the circumstances, was evidently of opinion that the landing of the goods took place with the consent of the revenue officer; the jury believed him; surely the defendant might innocently have acted under the same impression. The jury thought he had acted innocently, and therefore acquitted him, and the court will not set aside the verdict for the purpose of impeaching the grounds on which the jury became convinced of the defendant's innocence, and of placing him twice in jeopardy for the same offence.

The following cases will shew the construction which the courts place on penal revenue laws, and the reluctance which they have always shewn to interfere, where the defendant has been acquitted by a jury.—2 Stra. 899, 1238; 1 Wils. 17; Burnes, 435; 3 Wils. 59; 2 Black. 1226; 10 E. 268; 1 Camp. 450; 4 M. & S. 338; 2 Chitty, 273; 6 E. 315; 1 B. & A. 67; Rex v. Crooks in this court.

*Attorney-General* in reply.—I understood his lordship the Chief Justice to say to the jury, “if you find that the defendant had no intention to defraud the revenue, you may “acquit him,” but as the Chief Justice recollects what took place at the trial differently, I cannot deny what his lordship states as to his own charge, and therefore shall not argue that point.

CHIEF JUSTICE.—I did not charge the jury that they had anything in this case on which to found a verdict of acquittal; I merely said to the jury that the Attorney-General's construction of the law was too strict, and put cases hypothetically, shewing that the mere fact of landing goods or taking them away would not subject a person to the penalty, and that there might be a possibility of explanation to make the landing or taking away innocent.

*Attorney-General*—This is what misled the jury; I read the act differently from your lordship, and I think that it means to make every sailor or servant assisting (however innocently) in landing goods or taking them away liable; this construction would accomplish the intention of the act, which is to make carters, sailors, servants and others, careful how

they interfered with the landing of goods ; and the fact of their refusing to interfere would in such cases go a great way to convict the master. There is a wide distinction between the case of receiving or having in possession smuggled goods, and the offence charged in the present case, as it is necessary that a *scienter* should be established, before a party could be made liable to a penalty for having or receiving the goods, and this is expressly settled by the word “knowingly” made use of in the statute ; in the clause affecting the present case that word is omitted, and for the best of reasons. A merchant purchasing goods already in this country has every reason to suppose that the duties have been regularly paid, and it would be a hardship upon him, were he required to trace these goods through all the hands in which they might have been since their arrival ; sometimes this would be impossible ; but in the case of landing or assisting in the removal of the goods, the master of the vessel, if the goods are regularly landed, must have it in his power to satisfy any enquirer instantly, by producing his permit ; in the one case the law does not require a scrutiny into circumstances, but punishes the person who knowingly transgresses ; in the other the penalty is inflicted upon wilful ignorance, as well as upon intended transgressing.—*Young v. Jarvis*, Exch. Rep. 498 ; 2 Bos. & Paller, 532.

As to the argument made use of for the defendant, that being once acquitted he ought not again to be put upon his trial, it would have some force, were the party charged with a crime and indicted ; the evading or breaking the revenue laws cannot be considered in that light ; the smuggler refuses to pay the duties according to law ; he makes money by it, at the risk of having to pay a penalty, which, if he should happen to be discovered, is exacted from him by what is both in form and substance a civil proceeding ; and in granting a new trial, the court ought to be governed by the same rules as if this were a proceeding to recover the duties payable on the goods, or any other debt due to the king. If, therefore, his lordship the Chief Justice was mistaken in his construction of the law, or if the jury made a mistaken application of his lordship’s sentiments to the

present case, the court will grant a new trial as in any other civil proceeding.

The Chief Justice (after stating the case and proceedings at the assizes), delivered the judgment of the court.

The Attorney-General moves for a new trial, and he assigns as a ground for it, that the jury were misdirected, and also that they gave a verdict contrary to evidence; I remember nothing said by me, in the course of my charge, which has since appeared to be erroneous; I did not think at the trial, and I have seen nothing since to persuade me, that the rigid construction of the act contended for by the Attorney-General can prevail without exception. I will suppose that a person comes here from the United States with a cargo of tobacco, with no other thought than to enter it regularly, and pay all the duties upon it; he goes to the collector accordingly, and makes a true entry of the tobacco, and asking what is the duty, is told that it is two-pence per pound, when in fact it is three-pence; he pays what is demanded, takes his permit, and carries his goods on shore. The collector himself alone can know whether he erred from accident, or whether he intended to deceive; but let us suppose that having discovered his error, he hastens to the beach and finds a carter transporting the tobacco into the town, seizes it under the pretence that the duties have "neither been paid nor secured," which is literally true, "proceeds for a condemnation of the tobacco," and not satisfied with that, has an information filed against the carter for the penalty. The jury might be told at the trial, that these goods were landed before the duties had been paid; that being so liable to forfeiture, the defendant had been concerned in removing them, which was all that the statute required to be proved; and they had therefore no power to enquire further, but must convict. Again, let us suppose that a master having reported his vessel, the collector repairs to her, and while on board takes an entry from the owner of part of the goods, and receives the duties; that the owner in consequence sends down a carter to land them, who goes to the vessel, asking for this person's goods; the collector by mistake points to a package which in fact belonged to another person, and had not yet been entered;

the carter in consequence takes it and puts it on his cart ; the collector soon discovers his error, follows him and makes a seizure, and afterwards causes the carter to be prosecuted for a penalty, which if he has incurred at all, he has innocently incurred, from an error into which the king's officer, acting for the public, carelessly led him.

In these cases it may be contended, that the words of the act affording no latitude, conviction is inevitable, and the defendant must apply to the mercy of the crown, which he will doubtless receive. I think he is more satisfactorily protected by the genius of our laws, and the spirit in which they are administered ; I think he is entitled to an acquittal under such circumstances, from the verdict of a jury, and not driven to appeal to clemency, when there has been clearly no guilt.

I grant these are extreme cases, but not more so than that of a vessel being stranded from tempest, and the goods landed to prevent their destruction, in which case it was lately made a question, whether such a case would avail a party, and found that it could, not upon any words in the statute, but upon the principles of natural justice.

It is very possible that in remarking generally upon general principles which had been forcibly insisted upon, I may have laid down some position in terms which my brother judges may not concur in, and which may be shewn to be founded in error ; if that be so, (and it is very certain that my ideas of the duties and powers of courts and juries, in acting upon penal statutes, do not agree with those which were advanced on the trial, and have been urged again here,) it is of consequence that I should not continue in an error, which on some future case upon other facts might occasion me to give an improper charge. But then it is necessary to consider, that we are not at liberty, merely for the sake of arriving at correct notions of law with a view to other cases, to subject the defendant, who in this case has been acquitted, to the risk and vexation of a further trial, unless some ground can be shewn that will warrant it.

As to the jury having decided against the evidence, I think they did ; but they decided upon the whole evidence



upon a full hearing of the case, and I know of no instance in which a defendant, acquitted upon an information by the Attorney-General for a penalty, has been subjected to a second trial under such circumstances as these.

If it should appear clearly to the court that the jury were misled by a misdirection of the judge in a matter of law, and that such misdirection led to the verdict, I think at present that a new trial might be granted.

Upon the general question, whether the words of a penal statute must always be literally applied, without regard to their object, or the principles of natural justice, I would refer to Plow. 17; Foster's Crown Law, Appendix, 440; 4 T. R. 457, 682; 5 T. R. 17; 10 E. R. 19; as authorities bearing on that question, and to Reeves' Law of Navigation, upon the subject of importation from stress of weather.— See *Ranston v. Etteridge*, 2 Chitty's Rep. 273; 5 T. R. 19, 20; 1 McLel. & Y. 338.

*Per Cur.*—Rule discharged.

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#### MONTGOMERY V. ROBINET.

Affidavits may be received, contradictory of the answers of a prisoner in execution to interrogatories filed to deprive him of the weekly allowance, and in answer to an application for his discharge. And the court will not discharge the prisoner, unless they *are satisfied* that he has no means of support, and has not fraudulently secreted or conveyed, &c.

*Washburn* shewed cause against a rule nisi for the discharge of the defendant, a prisoner in execution. It seems interrogatories had been filed, and answers given. *Washburn* proposed reading affidavits contradictory to the defendant's answers, and shewing that he had means at his disposal sufficient for his maintenance, without resorting to the weekly allowance. *Spragge* objected to the reading of these affidavits, and contended that the statute of 1822 prescribed the manner in which the prisoner's solvency or insolvency should be ascertained, i. e., by interrogatories and answers; that if these answers were satisfactory, the prisoner must be discharged, and if they were false, the only remedy was by indictment for perjury; that no new affidavits could be received, as such a course would not only be contrary to the statute, but would lead to endless contradictory affidavits.

The court allowed the affidavits to be read, and *Spragge* read several others explanatory of and contradicting them.

ROBINSON, C. J., delivered the judgment of the court.

This case turns upon the construction of the statutes of 1805 and 1822, respecting insolvent debtors. Under the statute of 1805, the only way of meeting the application for discharge in consequence of the nonpayment of the weekly allowance, was by shewing that the defendant had secreted or conveyed away his effects to defraud his creditors.

If it could be proved that he had means which the creditor could not touch, as money or debts due him, could the court take this as a reason for not discharging? I think by the equity of the statute they could, as that would prove that the prisoner was able to maintain himself, and had obtained the allowance on a false suggestion.

The act of 1822 was passed for three purposes; first, to enable the plaintiff to call on the defendant to answer as to his means, when he suspected him of fraudulent concealment; secondly, to enable a judge in vacation to discharge an insolvent debtor in case of nonpayment, which the former act did not properly authorize; thirdly, to prevent the claim for the allowance attaching until a service of the rule had been made on the plaintiff or his attorney within the district where the prisoner is confined; a provision that may produce inconvenience, for it is not certain that either the one or the other will be resident in that district.

The language of the last clause of the act of 1822 is very peremptory as to a prisoner's discharge in case of nonpayment, omitting any proviso as to the court being satisfied that he has effects or has secretly conveyed them away, and of their power to discharge on that ground; but on consideration it seems clear, that this part of the subject was only alluded to in the latter act for the sake of introducing the two amendments I noticed; that the object of the latter act is to give additional security to the creditor against frauds, and not to place him at the mercy of the defendant, by making the answers of the latter conclusive; and that the act of 1805 is not repealed in that part which admits the plaintiff to satisfy the judge, that the defendant has secreted or

conveyed away his effects; and therefore I now think that we are to look at the affidavits offered in this case, and see whether they justify us in retaining the prisoner in confinement though the allowance has been withheld from him.

He has answered the interrogatories submitted to him; the payment can be no longer suspended therefore, unless his answers are unsatisfactory.

I think on the whole his answers are satisfactory, and as to the affidavits filed by the plaintiff, I do not think that they either shew the defendant to have means at his disposal for maintaining himself, or that he has secretly or fraudulently conveyed away anything in order to place it beyond his creditors' reach; and I think therefore the defendant should be discharged.

*Et per Cur.*—Rule made absolute.

WOOD, ADMINISTRATOR DE BONIS NON OF ROBERTSON, v.  
LEEMING AND APLEGARTH, EXECUTORS OF HATT.

An executor is estopped to plead *plene administravit* to a declaration on *sci. fa.* to revive a judgment against himself; and the nature of such judgment appearing on the face of the declaration, the plea is bad on demurrer.

In this case *scire facias* is brought to revive a judgment obtained by the same plaintiff against these defendants, as executors of Hatt, for 10,003*l.* 6*s.* 10*d.* damages and costs in assumpsit, to be levied *de bonis testatoris si, &c.*, and *si non* then 3*l.* 6*s.* 10*d.* for the costs *de bonis propriis*; two *nihilis* being returned on the writs of *sci. fa.*, the defendants appear by attorney, and as to the 3*l.* 6*s.* 10*d.*, they plead that *at the time of the commencement of this suit* they had fully administered all the goods and chattels which belonged to the testator at the time of his death, which came to their hands to be administered, and that they have not, nor hath either of them had since, any goods or chattels which belonged to the said Hatt at the time of his death to be administered; the plaintiff demurred generally to this plea.

*Sullivan*, in support of the demurrer.—There can be nothing clearer, than that the defendants are estopped from pleading *plene administravit* in answer to this declaration in *sci. fa.*, and this estoppel appears upon the pleadings on this

writ, and therefore a demurrer is the proper method of taking advantage of it. It appears on the face of this declaration, by the statement of the judgment recovered and the award of execution, "to be levied of the goods, chattels and effects, " which were of the said Richard Hatt at the time of his " death in the hands of the said executors, &c., and *si non*, " then the sum of 3*l.* 6*s.* 10*d.* for the costs, to be levied of " the proper goods and chattels." Now this is the judgment in all cases where assets are admitted by the judgment, as by *cognovit* or default, or in any other case where the executors are fixed with assets by the judgment; and the statement of this judgment in the declaration satisfactorily shews that no plea was pleaded, nor reservation made with respect to assets; as if there were, it must have been noticed in the judgment, and the fact of assets settled one way or the other. In the different forms of judgments (Tidd's Forms, 219); and in cases on a plea of *plene administravit*, where a judgment of assets *quando* is given (Tidd's Forms, 220-221); also in the same page, where judgment debts were pleaded, judgment is given " to be levied of the goods and chattels of the " deceased, &c., and which, *after satisfying the said judgment*, " shall hereafter come." Thus the judgment in all cases clearly shews whether or not assets have been denied or prior debts pleaded, or any other matter alleged to relieve the assets, or to shew that there were none.

If the declaration did not shew this by the statement of the judgment, the matter of estoppel must have been replied. In this case a demurrer is proper.—1 Saund. 226, note 4; 2 Str. 17; 7 T. R. 537; 8 T. R. 487, Willis, B.; 2 Taunt. 278.

It being thus apparent that this plea was not made use of in the original action, it appears very plain that if the not pleading it be a confession of assets, the defendant cannot now deny assets or say that he administered. It is a rule in pleading, that a party must plead his whole defence at once, and no plea can be pleaded to a debt on a recognizance or judgment, or to a declaration on a *scire facias*, which might have been pleaded to the original action. The defendant is held to the defence he first sets out with, and is neither allowed to depart in pleading in the same suit nor in any one



founded on it; and this seems grounded on the strong good sense and justice which distinguish our rules of pleading at common law, for the defendant ought not to be allowed to shift his ground and make several defences, and produce endless litigation and contention, when the defence might have been pleaded at once; and the conclusion is irresistible, that a party would never have pleaded a false plea or made no defence, and at the same time kept back a true defence to be set up at another time. "There can be no averment in pleading against the validity of a record, and therefore no matter of defence can be pleaded which existed anterior to the entry of the judgment."—1 Chitty, 557; 2 Marsh. 392.

The case of *Triel v. Edwards*, M. T. 1703, 6 Mod. 308, is directly in point.—"If an executor suffer judgment by default, he cannot give in evidence afterwards the want of assets, for he is estopped; for he should have pleaded that he had fully administered, or specially what assets he has."—Cro. El. 102; 2 Stra. 1075; 1 Jones, 87; 1 Wils. 258; 3 T. R. 685; 1 Chitty, Pl. 427; 4 Mod. 296; Cro. El. 575; 2 Saund. 720.

But supposing the words in the plea, "at the commencement of this suit," should be held to mean at the suing out of the *sci. fa.*, as a *sci. fa.* is held to be a suit for many purposes—Co. Lit. 290 b., 291 a.; Skinner, 682; 2 L. Raym. 1048; 2 Wils. 251; 2 Bl. R. 1227; 2 T. R. 46; Comberbush, 455—the executor cannot be allowed to plead it, for being fixed with assets at the time of the judgment, it would be a *devastavit* were he to depart with them except to satisfy the judgment. If there were prior judgments, the fact ought to have been pleaded before the original judgment, but it is not even alleged now in this plea.

Even if this were an action of debt suggesting a *devastavit*, an executor cannot deny assets.—1 Atkins, 292—decision on a demurrer; Salk. 310; 3 T. R. 689; 1 Wils. 258.

*Ervine v. Peters*, 3 T. R. 687, and the case of *Rock v. Leighton* therein cited, Buller, J., says—"It is a universal principle of law, that if a party do not take advantage of a circumstance at first and plead it, he is afterwards estopped either in another action founded on the judgment or on

"*sci. fa.*"—See also 2 Stra. 732; 3 E. 2; 1 Saund. 219, b.; Lilly's Entries, 2.

The *Attorney-General* against the demurrer.—It is not contended that the defendants mean to refer to the commencement of the proceeding by *sci. fa.* It is quite plain the plea refers to the commencement of the original action. It will be seen by referring to the original judgment roll, that the judgment is on a *cognovit*, in which the defendant does not confess assets, and which is an agreement merely that the debt may be levied of such goods, &c., as there were in the hands of the defendants or should thereafter come into their hands to be administered. It would be extremely hard if this confession, which seems merely intended to prevent expensive proceedings, should be held to be a confession of assets, which it certainly never was intended to be. The plea in this case is taken from Lilly's Entries, 667, and is supported by several authorities.—Plow. 440, Cro. El. 859. In 1 Chitty's Pl. 427, it is said, "An executor can plead "*plene administravit* to a *sci. fa.* brought against him to revive "a judgment."

In *Newton v. Richards*, 4 Mod. 296, the same plea is supported on demurrer—"quod nulla habet bona et cuttulla "quæ feurint intestate tempore mortis suæ in manibus suis "administrandis nec habuit die impetrationis brævis præd. "nec unquam postea;" and this case is quoted in several reports.—1 Lord Raym. 3; Comb. 298, S. C.; Skin. 565; Holt. 42; 4 Mod. 296; 1 Salk. 296.

*Sullivan*, in reply.—It will be found on reference to the cases, that where this plea has been supported it is in the case of a judgment against the testator; in which case there is no pretence that the executor or administrator confessed or admitted assets; and of course the pleas were good, which they would not have been had the judgment been against the executor or administrator.

ROBINSON, C. J., delivered the opinion of the court.

The plaintiff demurs generally to this plea; and it is clear, upon the most satisfactory authorities, that it cannot be sustained. It is a general principle that a defendant can plead nothing in bar to a *scire facias* which he might have pleaded

to the original action.—Cook v. Jones, Cowper, 727. And the application of this principle to the very circumstances of the present case is established in the following cases—Rock v. Leighton, 1 Salk. 310, and Lord Raymond, 591; Earle v. Hinton, Stra. 732; Skelton v. Hawling, 1 Wils. 258; and Ewing v. Peters, 3 T. R. 685, 1 Saund. 219.

It is alleged in argument that the original judgment is by confession. All we know from the record before us is, that the judgment was given against the executor, to be levied *de bonis testatoris*, which could not have happened if he had pleaded *plene administravit*, and succeeded on that issue. But looking upon the original judgment as obtained by confession, can make no difference in the principle. It rather, if possible, makes the application of it more reasonable; since a confession admits in express terms the right of action, which a judgment by default admits only tacitly: and this distinction is noticed by the judges in one of the cases I have cited.

The case of Gibson v. Brook, Cro. El. 859, seems at first sight at variance with the general current of authorities which must decide this case; and in the case of Ewing v. Peters, and in that only, it is cited in argument, as an authority to shew that an executor may plead *plene administravit* to a *scire facias* for reviving a judgment obtained against himself; and it is clearly inapplicable, for a reason which I shall presently mention. It is not adverted to in the judgment of the court, that if the executor is so conclusively estopped by the first judgment from denying that he has assets, he might as well be subjected in the first instance to a judgment to levy *de bonis propriis*, since it must infallibly end in that if no assets remain. That apparent incongruity is alluded to in several of the cases, and particularly in 2 Wils. 258, and 3 T. R. 685, but it is satisfactorily explained by the court; and in the latter case Mr. Justice Buller is at pains to shew the reason of the law in that respect. Indeed, since the judgment by confession admits the existence of assets, there is every reason why the judgment should direct the debt to be levied of those assets, since they are liable to satisfy it in the first instance, and their existence stands ascertained.

“ Though it is found upon a *plene administravit* (Mr. Justice Buller says,) that the defendant hath assets, yet is the judgment the same, and so it ought to be; for if the defendant hath assets, there is no reason to levy the money upon the executor’s own goods, unless he hath wasted, and that being matter of fact it must appear upon the record, and judgment be given thereupon before his own goods can be affected.”

It is very plain, on consideration, that the case relied on, *Gibson v. Brook*, Cro. El. 859, is not in the least inconsistent with the doctrine that the executor in this case cannot plead *plene administravit* to the *sci. fa.*; such a plea affirms the want of assets, a defence which might therefore and should have been pleaded to the action; but traversing a *devastavit* or denying that he had wasted, as in the case of *Gibson v. Brook*, is a very different matter, that is not consistent with the existence of assets at the time of the action brought, or of the judgment. The executor may have rightfully applied those assets since, and that would discharge him from the *devastavit*, and bar a recovery against him *de bonis propriis*, where the existence of assets is admitted.

It does indeed appear, in the case of *Gibson v. Brook*, that the executor pleaded to the *sci. fa. plene administravit*, and that he had not wasted; the first part of this allegation was clearly no defence; the second was: it was objected on the demurrer that the plea was double, but held otherwise, and that the plaintiff was held bound to answer to these matters objected, (by which I suppose is meant the one as well as the other,) and he has elected not to take issue on any of them; that is, he has denied by the demurrer that any thing pleaded constituted a defence, whereas the denial of the *devastavit* was a good answer, for it was held that the return of *devastavit* upon the inquisition was traversable.

It is clear that judgment must be for the plaintiff on the demurrer.

MACAULEY, J., gave no opinion.

*Et per Cur.*—Judgment for the plaintiff.



## DOE EX DEM. HENDERSON V. BURTCH.

A judgment is not a lien upon land for the purpose of an *elegit* to prevent the effect of a *feri facias* under 5 Geo. 2 ch. 7, sued out upon a judgment subsequently entered; the *feri facias* being in the sheriff's hands before the *elegit*.

A *concilium* was granted to argue a point reserved at nisi prius. The lessor of plaintiff claimed under a sheriff's sale upon a judgment, a writ against goods and chattels, the ordinary return of *nulla bona*, and a writ against the lands and tenements. The defendant's claim was founded upon a judgment entered and docketed previously to the judgment under which the lessor of the plaintiff claimed, and on a *elegit* sued out after the issuing of the writ against the lands and tenements, its delivery to the sheriff and the sale; the land was extended under the *elegit*, and so the defendant got possession, and the question was, whether the defendant's judgment, being the prior one, should not be held as a subsisting lien and charge against the land, notwithstanding the proceedings under the judgment.

The case was argued by the *Solicitor-General* for the plaintiff; he contended that there being no writ in the sheriff's hands at the suit of the defendant, he was bound to proceed and sell under the one which he first got; the question is not here as to the validity of the writ of *elegit*, or whether if it first comes into the hands of the sheriff it should be acted upon to the injury of persons proceeding under the statute 5 Geo. 2, but whether the plaintiff who first enters and docket his judgment, may remain inactive for any indefinite period, and afterwards extend lands already sold under the statute. There can be no doubt but that the writ against lands is binding on them, from the time it is placed in the sheriff's hands, even against judgments previously entered; the point has been disputed that it can have relation back to the judgment and to the first execution, but it has never been alleged that it does not operate as a lien from the time it is placed in the sheriff's hands, in the same manner that writs against goods and chattels are held to bind them.

To refuse the precedence to the writ under the statute first placed in the sheriff's hands, would be in effect a repeal of the stat. 5 Geo. 2, for how could a plaintiff have the same

remedy against lands and tenements, which he has against goods and chattels, if in the former case it is liable to be defeated by a circumstance utterly unimportant in the latter, namely, the priority of the entry of the judgment.

*James Boulton*, in reply.—There is no doubt that in England the entry and docketing of a judgment creates a lien upon land, which can only be got rid of by the payment of the judgment; the law of England in that respect is not repealed in this province, and here the same remedies are open, as the plaintiff in an action might there avail himself of.

It is of great consequence, in this country, that the doctrine of the lien upon lands by means of a judgment should be sustained, as it is a very common mode of securing a debt. The consequence of a decision to the contrary must be, that a creditor has no safety but by proceeding to the sale of land at once for the payment of his debt; whereas he might be very willing to allow his money to remain at interest, if the judgment were held to be security.

The plaintiff has still his remedy under the subsequent judgment; he sells liable to the incumbrance, as if it were a mortgage, and there is no more reason for destroying the lien, which the English law gives for the purposes of an *elegit* to the first judgment, than there would be for allowing the writ of *fi. fa.* against the lands to take the place of a previous mortgage, merely because the mortgagee neglects to bring ejectment on it.

ROBINSON, C. J.—Upon the case stated, it is plain the plaintiff is entitled to retain his verdict; independently of the principle that a lien to be retained must be acted upon with reasonable diligence, a bare statement of the facts shews that the defendant cannot possibly make title under the judgment at suit of Morris.

Henderson obtained judgment in July, 1825, against one Davidson, and after *fi. fa.* against goods returned, he sued out one against lands in May, 1826, under which these lands, which belonged to Davidson, were sold, and the sheriff made a deed to the lessor of the plaintiff, the highest bidder, upon that sale, on the 30th November, 1827.

The judgment at suit of Morris had been entered, it is true, in February, 1825, prior to that at the suit of Hender-

son ; and after a *fi. fa.* against goods, he forbore any further proceeding till 26th March, 1827, when he sued out an *elegit*, upon which an inquisition was returned, dated 15th December, 1827.

Now under Geo. II. c. 7, the plaintiff Henderson had the same remedy against the defendant's lands as against his goods. It is clear, that in the case of goods, if Morris's execution had even come first into the sheriff's hands, and he had nevertheless sold under Henderson's execution subsequently received, he would have been liable to Morris, the sale would have been valid, and the purchaser's title not liable to be defeated.—1 Salk. 320 ; 1 T. R. 729.

But here no execution came to the sheriff's hands against the lands of Davidson for more than a year after he had received the execution at the suit of Henderson, nor until he had acted upon it, and as I take it actually sold the land, though that is not positively stated. It is not necessary in such a case to determine whether an *elegit* can be resorted to in this country, to the prejudice of the remedy of other creditors, upon 5 Geo. II., whose satisfaction from the sale of the land would be indefinitely postponed, if a prior plaintiff could hold them until he was satisfied out of the annual profits.

MACAULAY, J., gave no opinion.

*Per Cur.*—Judgment for the plaintiff.

#### MCCAGUE V. MEIGHAN ET AL.

The court set aside an arrest and bail-bond, the plaintiff having had the defendant arrested before for the same cause of action, and having been *non-pressed* thereon for not declaring.

*King* moved for a new rule to shew cause why the arrest and bail-bond, &c., should not be set aside, on affidavits, stating that the defendant had been arrested before for the same cause of action, in which case the plaintiff was *non-pressed* for not declaring.

*Baldwin* objected to the affidavits, as being sworn before Mr. King, who was the attorney, and a commissioner of the King's Bench.—3 Atk. 813 ; 3 T. R. 403 ; 8 T. R. 638 ; Whitw. 62 ; 8 Taunt. 74, 136 ; 3 M. & S. 154 ; Rule of K. B., 15 Geo. II. c. 2.

The court decided, that although Mr. King was not yet the attorney on the record, there being no bail above, yet acting as attorney and being instructed to defend, the affidavits were bad, because sworn before him.

The affidavits being re-sworn, the rule *nisi* was granted, and the case was argued by *Baldwin*, who shewed cause on the return of the rule, and *King* was heard in reply.

ROBINSON, C. J., delivered the opinion of the court.

I am of opinion, that as this case stands before us the rule should be made absolute; and I am convinced, on a general review of the cases, that the Court of King's Bench in England would at this time set aside an arrest under similar circumstances, as the Court of Common Pleas would it seems always have done.

Upon the affidavits filed, the simple fact is disclosed, that the defendants have been arrested in a former action by the same plaintiff and for the same cause; that in that action the plaintiff was *non proessed* for not declaring, and has not yet paid the defendants their costs.

Nothing whatever appears to repel the inference of vexatious conduct which certainly arises from this proceeding while unexplained, and nothing is shewn which should exclude the application of what as a general principle is certainly recognized in the King's Bench in England, as well as in the Common Pleas, that no person shall be held to bail a second time for the same cause of action.

We have not given any consideration to the statements in the affidavits which respect the merits of the cause. With the exception of the case in *Strange*, 439, *Turton v. Hays*,—which seems to have been little regarded in subsequent decisions—the cases where a second arrest has been sanctioned are scarcely less authorities against the present plaintiff than those in which the second arrest is declared irregular, because the circumstances which were relied on to support the second arrest are wanting here: we have nothing but the unexplained fact of a second arrest before us.—See 2 Wils. 381; Str. 1039, 1209, 1216, 1218; 3 E. 309; 8 E. 334; Lord Ray. 679; 2 Wils. 93; 4 Bur. 2503; 3 Moore, 607; 4 Moore, 294; 1 Brod. & Bing. 289, 514; 6 T. R. 218; 3 D. & R. 189.



Mr. Impey, in his Practice of the King's Bench, seems to consider the general rule "*nemo debet bis vexari pro eadem causa*" to be clearly recognized in the King's Bench, and that something must be shewn to authorise the second arrest, and the case in 6 T. R. 218, is certainly in accordance with that opinion.

*Per Cur.*—Rule made absolute.

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GREGORY V. FLANNEGAN.

A judgment for the defendant against the plaintiff cannot be removed from a district court into the King's Bench, under the 19 Geo. III. c. 70, s. 4.

*O'Reilly* moved for a writ of *certiorari*, to remove a judgment obtained by the defendant against the plaintiff, on an affidavit made of the recovery of the judgment, and of diligent search and enquiry having been made after the person and effects of the plaintiff, and that they were not found in the District of Gore, &c. He stated that the application was made under the 19 Geo. III. c. 70, s. 4, for the purpose of obtaining execution against the plaintiff without bringing an action on the judgment. The only difficulty seems to arise from the literal terms of the act apparently confining the remedy to cases where the plaintiff obtains judgment, but the present case is fully as much within the equity of the act, and the evil which it was intended to remedy.

ROBINSON, C. J.—There is no necessity to inquire whether the act 19 Geo. III. c. 70, is part of the law of this province or not: it is perfectly plain the statute only gives a remedy in proceedings against defendants, therefore the court must refuse the present application.

MACAULAY, J.—By 34 Geo. III. c. 2, this court possesses all such powers and authorities as by the law of England are *incident* to a court of civil and criminal jurisdiction, and may hold place in all actions, real, personal, and mixed, and judgment thereon give, and execution thereof award, in as full and ample a manner as can or may be done in his Majesty's Court of King's Bench or Common Bench in England.

By a previous act, resort is to be had to the law of England, as the rule of decision in all matters of controversy relative to property and civil rights.

And by subsequent statutes, 34 Geo. III., ch. 2, and the act of 1822, the several District Courts have been established with limited and local jurisdiction. They are courts of record, but I am not satisfied that the law of England has been adopted in such terms, and this court so constituted, as to introduce and to impart to this jurisdiction the statute 19 Geo. III., ch. 70.

The first section of that act restricts the right of arrest in inferior courts to 10*l.*, instead of 40*s.* as sanctioned by 12 Geo. I., ch. 29. Section two relates to the same subject; and section three repeals such acts as authorize imprisonment for a less sum than ten pounds. Section four authorizes the removal of the records of judgment from inferior courts, when the debt is under ten pounds, and this clause will on perusal appear local in its provisions and objects.

33 Geo. III., ch. 48, extends its provisions to Wales, and the Counties Palatine. 48 Geo. III., ch. 43, extends the same to the court of requests in Manchester. 51 Geo. III., ch. 124, sec. 3, extends the provisions to 15*l.*; and 7 and 8 Geo. IV., ch. 71, prohibits arrests out of any court for less than 20*l.*

It seems to have been induced by the change of the law on the subject of arrests; the three first sections having restrained arrest to 10*l.*, the fourth clause recites, "forasmuch as persons served with process issuing out of inferior courts where the debt is under 10*l.*, may in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of such courts."

Its provisions are general, but they relate only to defendants, i.e., judgments against defendants. Tidd's Pr. 401; Tidd's Pr. 402 (eighth edition), says, the act extending the provisions of the 4th section to Wales and the Counties of Palatine, &c., extends to all judgments, as well for the defendant as the plaintiff.

2 D. & R., 177, Patterson v. Reay—Bail cannot remove a judgment against defendant in the County Palatine of Durham, in order to render defendant under 19 Geo. III.,

ch. 70. The court say, if a plaintiff's judgment, it would be an anomaly to enable the defendant or the bail to remove the record in opposition to the wishes of the plaintiff, "the statute referred to, was passed in relief of plaintiffs, and not of defendants." The court declined interfering at the instance of the bail, unless the plaintiff consented.

See, also, 1 H. B., 532, o; 5 B. & A., 821; 1 D. & R. 537, S. 6.

Without determining, therefore, that the statute cannot be acted upon in this court at the instance of a plaintiff having obtained a judgment in his favour, I am of opinion the benefit of it cannot be claimed by a defendant having obtained a judgment against a plaintiff for costs in these courts.

*Per Cur.*—Application refused.

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## KING'S BENCH,

TRINITY TERM, 2 & 3 WILL. IV.

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Present,—THE HON. J. B. ROBINSON, C. J.

THE HON. MR. JUSTICE SHERWOOD.

THE HON. MR. JUSTICE MACAULAY.

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### FRANCIS GARDINER v. SARAH GARDINER, ADMINISTRATRIX OF JAMES GARDINER, DECEASED.

Lands are assets for the satisfaction of debts in the hands of an executor, under Geo. II. c. 7, and to a plea of *plene administravit*, the plaintiff may reply lands.

Assumpsit. The declaration contained a count upon a promissory note, and the common money counts, averring both promises by the intestate in his lifetime, and by the defendant as administratrix since his death, together with an account stated by the defendant as administratrix.

Pleas.—1st. The general issue to the whole declaration. 2nd. *Actio non accrevit infra sex annos* to the whole. 3rd. *Plene administravit*, alleging that she hath fully administered all and singular the *goods* and *chattels*, which were of the said James Gardiner, deceased, at the time of his death, and which ever came to the *hands of her as administratrix aforesaid to be administered*, to wit, at Kingston aforesaid, on the 1st August, 1823, and that she hath not, nor at the time of the commencement of this suit, or at any time since, had any *goods or chattels* which were of the said James Gardiner, deceased, at the time of his death in the hands of her as administratrix as aforesaid to be administered, wherefore, &c.” 4th. That administration was duly committed to her by the Surrogate Court of the Midland District, &c., of all the goods, chattels and credits which were of the said James Gardiner, deceased, in the Midland District at the time of his decease, to wit, &c., makes profert of the letters of administration, and avers that no other administration was ever granted or committed to her as administratrix as aforesaid, and that she hath fully administered all the goods, chattels and credits, which were of the said James Gardiner at the time of his decease, and which ever came to her hands as administratrix as aforesaid, to be administered under *and by virtue of the letters of administration aforesaid*; “and that she hath not or at the commencement of this suit or at any time since had any goods, chattels or credits which were of the said James Gardiner, deceased, at the time of his decease, in the hands of her as administratrix as aforesaid, to be administered;” and that she as administratrix as aforesaid “hath not nor did she ever have administration granted to her of any lands or tenements, or of any assets other than the goods, chattels and credits which were of the said James Gardiner, deceased, at the time of his decease.” 5th. Plea of set-off of a debt due to defendant as administratrix. The plaintiff takes issue on the first and second pleas. To the third plea plaintiff replies, that although true it is that defendant hath “not nor had any goods or chattels which were of the said James Gardiner, deceased, to be administered, &c., yet that the said James Gardiner at the time of his death was seized of divers houses, lands, heredi-



"taments and real estate, situate within this province of Upper Canada, and that plaintiff being a subject of our said lord the king, the said houses, &c., whereof the said James Gardiner died seized as aforesaid, were at the time of the commencement of this suit and still are *assets in the hands* of the said defendant as administratrix as aforesaid, and are liable and subject to satisfy the damages of the plaintiff by him sustained, by reason of the nonperformance, &c.," *et hoc par. est*, &c. To the fourth plea, a general demurrer and joinder. To the fifth plea, that the causes of set-off did not accrue within six years before the commencement of this suit.

Rejoinder to the replication to the third plea: "that defendant hath not, nor at the commencement of this suit, or at any time before or since, had any administration granted or committed to her, of any houses, lands, hereditaments or real estate whereof the said James Gardiner died seized," *et hoc par. est ver.*

Issue is taken by defendant on the replication to the fifth plea; general demurrer to the rejoinder to the replication to the third plea and joinder in demurrer.

This cause was argued in Michaelmas term last by Bidwell for the defendant, and the Solicitor-General for the plaintiff. *Bidwell*.—The general question which is necessarily raised by the pleadings in this cause is, whether the administratrix is liable to the amount of the value of lands whereof the intestate died seized, to a creditor who sues. Such a liability does not exist at common law, nor is it created in express terms by the statute 5 Geo. II., ch. 7.; it can only therefore arise by implication as necessary to fulfil the intentions of the legislature in passing the act. But these intentions must be drawn from the words and general context, which will be found to favour an opposite construction; it would seem unjust to infer such a liability, unless it were shewn that the administratrix had power to sell the lands for the payment of debts, without waiting till the expense of a law suit was incurred. No clause however is to be found in the statute conferring such a power, and it has never been argued that an administratrix has such a power. By the common law the lands of an intestate vest immediately on his death in his

heir at law; the fee cannot be in abeyance; it must vest somewhere immediately, and clearly the statute has not the effect of altering the succession. What then is to prevent the heir selling immediately after the death of the ancestor? Suppose the case of a specialty debt in which the heir is bound; if he sell lands which have descended to him before he is sued, the security is reduced to his personal liability, and the lands are not bound. The same effect must take place here; if the heir sells before any action brought or judgment recovered, by which the land could be affected, the administratrix cannot be liable, otherwise she would be made responsible for the value of lands over which she never possessed any control, and which were no longer available. Again, in consequence of her not having power to sell lands, if she is nevertheless responsible for the value of them to a creditor, on an issue of *plea ad ministravit*, she would be liable for the payment of costs, perhaps of the debt, out of her own funds, without the means of redress. But admitting that a power of selling is necessarily invested in an administratrix, which is the only way of getting rid of these difficulties, others present themselves of equal magnitude. If she does sell, a serious question might be raised, whether a purchaser would not be liable to see to a proper application of the purchase money; the power of selling must rest upon the necessity of raising funds to pay debts; for no other purpose could an administratrix sell, and the validity of the sale, or at least the liability of the purchaser to pay over the purchase money to the heir, might turn upon this very question. It may also be asked, could such a sale be made till the personal estate is exhausted, and must it be thrown upon a purchaser to ascertain this fact? Again, if a surplus remains after payment of debts, how is it to be disposed of? Is she not to pay it to the heir to whom the land of right belonged? Suppose she does so, and afterwards another creditor, of whose claim she had no previous notice, presents himself, who recovers judgment against her, how can she get back the surplus from the heir; or suppose a sale to take place under an execution, which produces more than the amount indorsed to levy, to whom is the sheriff to pay the surplus? If he is refractory, who is to sue him, the administratrix or the heir, and can the

right of one to recover in preference to the other depend upon the existence of other debts? And if so, how is this to be ascertained? It has been said, however, that the lands being made assets by the statute, the proceedings as to them are *in rem*, not putting a personal responsibility on any one; then when are these lands bound? Is it from the death of an intestate; so that if a sale should be made, it would be subject to the chance of some debt turning up, or even of a judgment being fraudulently confessed by the administrator? Again, if a debt be due to the administratrix, how is she to proceed if the personal estate is insufficient to pay; is the right which is given by law lost by the administratrix, while other creditors obtain advantages which they had not at common law? Again, if there are no goods, administration cannot be granted, and yet there might be lands which it is urged are assets, to be reached through the administratrix; how are the lands to be got at? Again, if there be no heir, on which account the lands escheat to the crown, can a creditor afterwards sell them, and so oust the king? If so, on an issue of *plene administravit*, if the creditor admits there are no goods, how can he issue a *fi. fi.* against goods, which the provincial statute renders necessary before an execution can go against lands; can such a writ be awarded upon a record on the face of which it is admitted that there are no goods? Admitting however, for argument sake, that the Surrogate Courts have power to grant administration of lands in this case, it certainly is not done; nor is it necessary that an administration of everything should be granted to the same person. Administration of one part of an intestate's goods may be granted to one person, and of the residue to another—Foller, 77. In the present case this is a limited administration not including lands; the letters of administration are set out in one of the pleas, and it is averred that administration of lands was not given to the defendant; they reply, there were lands; true, but not in the defendant's hands, and therefore there is no reason why she should be called upon to answer. If these lands had been sold under a judgment against the administratrix, she might still plead as she has now done, and it would at least or ought to suffice for her personal discharge, and a second execution might

be awarded against lands whereof intestate died seized, for it would not be incumbent on the administratrix to plead the sale.

*Solicitor-General.*—The inconveniences which have been argued upon, and the difficulties which are raised, cannot have the effect of preventing the operation of the statute. Difficulties and objections might equally be found to selling the lands in the hands of the heir, as well as in those of the executor or administrator; but the true criterion for settling this question, is not by enquiring in the first place in whose hands are they liable, but whether they are not made liable and assets for the payment of debts; that is, are not the lands themselves always liable to be sold for the satisfaction of debts on a judgment being recovered, without paying any regard to the person against whom that judgment is recovered. The execution against the lands does not affect the *person* in any way, the lands themselves being liable to be sold when once the debt is established by a judgment; even therefore if on these demurrers judgment were given in favour of the defendant, I should still hold that an execution might issue against the lands. As to the arguments which have been urged, of the power the construction contended for would give to executors, of fraud, &c., it is sufficient to say, that there is no more reason to conclude that the executors would misapply the proceeds of lands, than the proceeds of goods; there is in either case the same moral and legal responsibility.

It only requires a careful examination of the express words of the statute to arrive at this, its only true construction. By dividing the fourth clause, the apparent confusion is done away, and the intention manifestly appears to make the lands themselves liable to assets, whenever the debt itself was established. Such has been the construction of this statute in the United States, while they were colonies of Great Britain; and it is even now acted upon in the same way in the West Indies, for which, as well as the North American colonies, it was expressly passed. The whole argument was fully entered into, in the judgment in *Forsyth v. Hall*, and the opinion expressed in the decision of that case has not been satisfactorily controverted by anything urged on the other side.



*Curia adversus vult.*

And on this day the court gave judgment as follows:

ROBINSON, C. J.—These demurrers call up a question of much interest and importance, for in order to dispose of them it is necessary to determine, in the first place, whether the lands and tenements of a deceased debtor are liable under the British stat. 5 Geo. II. ch. 7, to be seized in execution and sold upon a judgment against his administrator, or whether in order to obtain satisfaction from the real estate of a deceased debtor, it is not made necessary by the statute to proceed against the heir; and in case of a will devising the estate, against the heir and devisee, according to the law of England in the case of a bond or other specialty by which the heir is bound.

The point is by no means new in this court, but I will treat it in the first place as if it were, and shall examine the question without prejudice from former decisions, though it will be proper afterwards to consider the course that has been pursued, and the decisions which have taken place under this statute, for they may be found to furnish considerations very important to be attended to on this occasion. It is my opinion, after all the investigation it has been in my power to give to this question, that the intention of the parliament was to afford to the British creditor the same remedy in the plantations against real estate as against goods, in all cases, as well where the demand was to be enforced after the decease of the debtor as in his lifetime; I think, also, that in the act which they passed, they have sufficiently declared that intention, although it is certain that they have expressed themselves in a manner that is well calculated to raise doubts.

To consider the statute first, with no other light to assist us in its construction than the words themselves afford: it is entitled, "An act for the *more easy* recovery of debts in his majesty's plantations and colonies in America." The preamble is in these words, "Whereas his majesty's subjects trading to the British possessions in America lie under great difficulties, for want of *more easy* methods of proving, recovering and levying of debts due to them, than *are now* used in some of the plantations; and whereas it will tend

“very much to the *retrieving* of the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the said plantations, and to the advancing of the trade of this kingdom thither, if such inconveniences were remedied.”

We cannot fail to see here, first, that the declared object of the act was to give greater facilities to creditors; to render the recovery of debts *more easy*. Secondly, the parliament were aware of the fact, that the inconveniences which they desired to redress existed only in *some* of the colonies, not in all. And thirdly, that with a desire of removing inconveniences where they did exist, they proposed to afford such facilities in recovering debts as would tend to *retrieve* the credit formerly given, and to the advancement of trade to the colonies. The providing for the ease and security of the creditor, and thereby encouraging trade, were avowed inducements to the statute, and there being no doubt of this, I should feel it difficult to convince myself of the accuracy of any construction that would make the provision of this statute in effect run directly counter to these objects, by creating, in most of the colonies to which it extended, obstacles to the recovery of debts which did not before exist, while they afforded an inconvenient and imperfect remedy in others. The question turns on the fourth clause, which runs thus, “And be it further enacted by the authority aforesaid, that from and after the (said) 29th day of September, 1732, the houses, lands, *negroes*, and other hereditaments and real estates, situate or being within any of the said plantations,” (i. e. the British plantations in America,) “belonging to any person indebted, shall be *liable to* and *chargeable with all* just debts, duties and demands, of what nature or kind soever, *owing* by any such person to his majesty or any of his subjects, and shall and may be assets for the *satisfaction thereof*, in like manner as *real estates are by the law of England liable* to the satisfaction of *debts due by bond or other specialty*, and shall be subject to the like *remedies, proceedings and process*, in any court of *law or equity* in any of the said plantations respectively, for *seizing, extending, selling, or disposing of* any such houses, lands, *negroes*, and other hereditaments and real estates, towards the satisfaction of

“such debts, duties and demands, and *in like manner* as personal estates in any of the said plantations respectively “are *seized*, extended, sold or disposed of for the satisfaction of “debts.”

The question raised upon this clause is one that we could scarcely suppose would have remained open for discussion, after the lapse of precisely a century; nevertheless it is contended on the one side, that the effect of this clause is to subject lands and tenements to be seized and sold in execution upon a judgment against the executor or administrator of a deceased debtor, and that they are to be dealt with in every respect as chattels for the satisfaction of debts; while on the other side it is contended, that the statute is not so entirely subversive of the distinction between real and personal estates, but that while it subjects real estates to be seized and sold in execution, as goods and chattels are seized and sold, it is still necessary to follow the assets into the same hands as you would be driven to do in England, and by the law of England, if you were seeking your remedy there. We are first to ask ourselves, whether this is the obvious construction of the whole clause; the first member of the sentence is, “that houses, lands, *negroes and other* hereditaments “and real estate, situate or being within any of the said “plantations, belonging to any person indebted, shall be “liable to and chargeable with all just debts, duties, and “demands, of what nature or kind soever, owing by any such “person to his majesty or any of his subjects.”

It is to be remarked here, and I think it not immaterial, that parliament treated negroes as real estate, and put them expressly on the same footing as houses and lands with respect to liability and remedy. In point of fact they were so treated in the colonies before this act was passed, and in most, if not all of them, they were placed on that footing by positive law; they formed a great part of the property of a planter in all the West India Islands, and in some of the southern colonies on the continent of North America belonging to Great Britain at that time, and it is material to consider, when we are deliberating upon a subsequent member of this clause, that whatever remedy this statute gives to the creditor for the more easy recovery of his debt, by the

seizure and sale of houses and lands, it gives the same remedy and no other, for obtaining satisfaction from the seizure and sale of *negroes*, though they were a description of property much more perishable. If therefore the houses or lands of a deceased debtor could not be sold, without first obtaining judgment against one or more heirs or devisees, the same proceedings would in a similar case be necessary for recovering the debt by the sale of negroes that had belonged to the deceased debtor. To proceed with the clause, it is said "the houses, lands, negroes, &c., *belonging to any person indebted*, shall be liable, &c.," an expression which in strictness confines the sense to the case of a debtor still living, because after his death he is no longer indebted, nor would there be anything belonging to him. If therefore we are to take this clause according to the proper import of the words, parliament did not up to this point contemplate the case of a deceased debtor. If they had done so, and had expressed themselves according to their meaning, they would have added, "or of which any person indebted shall have died or shall die seized." The statute however is not carefully drawn; at the end of the clause there is an obvious want of grammatical accuracy, in connecting the concluding member of the sentence with that to which it refers, so that I think it safe for this, or any other purpose, to look at the obvious import and intention of the whole statute, rather than to hang too much on any critical nicety. But I feel little or no doubt, especially considering what follows, that, so far as I have read, Parliament alluded only to the liability of real estates while they continued in the hands of the original debtor. And speaking of these, they declare that they "shall be *liable to* and *chargeable with* all just debts, duties "and demands of what nature or kind soever, owing by any "such person (i. e. any person indebted) to his Majesty or "any of his subjects." *Liable to* and *chargeable with*, as used in this member of the clause, and referring to the case of persons living—that is, persons still indebted, still owing, and to which persons so indebted and owing the real estates *belong*—can scarcely mean that they shall be liable in any other sense than goods and chattels are liable. These are not liable to or chargeable with a debt contracted by their



owner, any otherwise than as they are subject to be sold in execution, if they are not aliened before the execution be delivered to the sheriff—the debt forms no lien upon them in the hands of the debtor, whether it be a specialty debt or otherwise. So, as to real estate of a debtor in England, it is not in his hands *liable* to or chargeable with any debt until judgment is obtained. And then the judgment so binds it that it is so liable to be extended upon an *elegit*, or rather a moiety of it is so liable; and, so far as this liability goes, there is no distinction arising from the nature of the original demand, whether on specialty or otherwise. Perhaps the words “liable to and chargeable with,” were not intended here to have a complete and independent meaning, but were meant to be taken in connection with the remainder of the clause, “And shall and may be assets for the satisfaction thereof.” Here we arrive at that part in which parliament intended to provide a remedy against the property of a deceased debtor. They make his real estate *assets*; and then immediately follows this expression, “in like manner as real estate are by the law of England liable to the satisfaction of debts due by bond or other specialty.” Now upon this last expression the difficulty turns, and upon that solely.

With what view were those words inserted, and what effect are they to have upon the operation of the statute? Suppose they had been omitted, then the statute would have plainly declared that real estates should be liable to all debts of persons indebted, and should be “assets for the satisfaction thereof,” and to cite here the remainder of the clause, “that they shall be subject to the like remedies, proceedings and process in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, &c., towards the satisfaction of such debts, &c., and in like manner as personal estates, in any of the said plantations respectively, are seized, extended, sold or disposed of for the satisfaction of debts.” Upon such a statement of the intention of the legislature, there could have been no room for doubt; they would have been assets to satisfy all debts, and assets subject to the same remedy for seizing, extending and selling, as goods and

chattels are subject to. It must have followed from such a provision, that as goods and chattels are liable to be sold upon an execution against the executor or administrator, so must real estate have been held to be, for every thing in the act would have tended that way, and there would have been nothing that could by any construction have been held to restrain or qualify.

Let us suppose, on the other hand, that the clause had ended with the words, "in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty," and had not contained the following words, "that they should be subject to the like remedies, proceedings, &c., for seizing, selling &c., and *in like manner* as personal estates." Suppose, I say, that these last words had been omitted, then there would have been this difficulty in the construction, that throughout the clause there would have been no allusion to personal estates; the word *assets* is of double import; it may mean real as well as personal, and the only guide to the meaning which we should then have had, would have been in the words "in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty." Perhaps upon such a clause it would have appeared impossible to give any other construction to the statute, than to say, that for debts due by simple contract the heir may be sued as in England for debts due by specialty, and that the same proceedings and process of execution should follow; but certainly such a construction would have been very much at variance with the professed object of the statute, the advancement of trade and the rendering the recovery of debts more easy, and it must have been admitted that the legislature had expressed themselves very inaccurately, if that were their meaning. For although the words "in like manner" follow immediately after the words, "and shall be assets for the satisfaction thereof," their connection with that member of the sentence is not so obvious as with that preceding. It is not said real estates shall be assets in like manner as real estates are by the law of England *assets* for the satisfaction of debts due by specialty, but in like manner as real estates are by the law of England *liable* for the satisfaction of debts

due by bond or other specialty. Whence it seems very natural to infer, according to the common construction of language, that the legislature meant to provide, that lands and tenements in the colonies should be liable to and chargeable with all debts, in like manner as by the law of England they are liable for the satisfaction of debts due by specialty; leaving the words "and shall be assets for the satisfaction thereof" in a parenthesis. But let us give the latter words their most extended construction, and apply them, so far as they can be applied, to whatever goes before; "real estates shall be liable to and chargeable with all debts, and shall be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty."

In what manner are real estates in England liable to the satisfaction of debts due by bond or other specialty? If the original debtor be living, they are no more liable in his hands to the satisfaction of such debts than to the satisfaction of simple contract debts, or of damages recovered in any form of action. The lands themselves could not be taken in execution at all till the remedy of *elegit* was given by the Statute of Westminster 2nd; and when the original debtor is dead the real estate is not liable to his debts due by bond or other specialty, unless when the heir is expressly bound by the terms of the instrument: it is evident the propriety of this expression was not very closely studied, and considering the very explicit provision which follows, I cannot ascribe to it the meaning that has been imputed to it on the part of the defendant, viz., that no remedy can be had against the lands of a deceased debtor under this statute, except by action against the heir or the heir and devisee. It has been urged, if parliament intended to make no distinction between real and personal estate in the manner of pursuing the remedy, why did they not say in plain terms, that lands should be assets in like manner as personal estates; *I think they have said so*, and in terms more minutely explicit, when they declared that they shall be subject to the same remedies and proceedings for seizing and selling; and, on the other hand, it is natural to ask, if parliament intended that they should only be liable upon a proceeding against the heir, why did they not in

express terms give a right of action against the heir, when certainly none existed before, and declare that he might be sued on the simple contract debt of his ancestor, and on any debt, whether he should be named in the instrument creating it or not. I am by no means desirous of being understood, that the right of action would not accrue by implication under the statute, if the liability of the land in the hands of the heir were clearly expressed, but it seems improbable that the legislature would have left us to derive from implication and upon principles of the common law, a form of action unprecedented in the English courts of justice.

Let us suppose, however, that any creditor, assuming that this was their intention, should take out process against the heir, and declare against him for the balance of an unsettled merchant's account due by the decedent, a very anomalous proceeding against the law of England. Might not the heir very naturally enquire, upon what authority the creditor brought an action against him for such an unliquidated demand against his ancestor arising upon simple contract? The answer would be, I bring it under the statute 5 Geo. I.I, I know you did not undertake to pay this debt, and are not bound by your ancestor to do so, but your ancestor left land which by the statute is liable to the satisfaction of my debt, and I am seeking satisfaction from the land. Very true, the heir might reply, but you are seeking it in a very different manner from that which the statute directs. If you desired to obtain satisfaction from the goods of the debtor, could you do so by obtaining judgment and execution against me as his heir? Certainly not; how then do you sue me as his heir under the authority of the statute, when the statute expressly enacts that you shall have the same remedy and the same proceeding for seizing and selling the lands, as for seizing and selling the goods, and *in like manner*.

In short, whatever doubts might have been entertained if the legislature had been silent as to the "*remedy, proceeding*" and *process*," it seems to me there can be none when we view these latter words as part of the statute. It must be allowed to the legislature to explain their meaning as they proceed, and I think they have done so in such a manner as to render it impossible to give to the preceding part of the



clause the construction placed upon it by the defendant, without setting aside the more particular and intelligible announcement of their intention which they have given in the conclusion. The construction which allows the creditor to take his remedy against the executor or administrator to the full extent of seizure and sale of the real estate, is consistent with the very words of the clause in that part where the intention is the most clearly and unequivocally expressed. It is consistent also with the avowed object of the act, the rendering the recovery of debts *more easy* than it was in *some* of the plantations. But I admit, and I have always thought it is attended with this objection, that it is not easy upon such a construction to account for the introduction of the words, "in like manner as real estates are by the law of England liable to the payment of debts due by bond or other specialty," and to determine what meaning can be assigned to them consistent with such construction. Undoubtedly, if we should find it impossible to reconcile them, this would not be the first instance of parts of the same statute being apparently repugnant to each other, and we should be driven to this, as in other instances that might be cited, to deduce the true meaning from the whole, and in doing so we should be adopting the general and reasonable rules of construction, in suffering the former words to be controlled and explained by those which follow, when the latter are more particular and definite. But I am not sure that to the majority of persons, the difficulty of reconciling these two members of the clause would not seem rather imaginary than real. I think it probable (after having puzzled myself over them more than a hundred times), that nothing more was meant by them than to shew by illustration *to what extent* it was designed to make lands liable. As if parliament had said, notwithstanding by the law of England real estates of deceased debtors are liable only to the satisfaction of debts due by bond or other specialty (they should have added, in which the heir is bound), they shall in the colonies, for retrieving credit and advancing trade, be *in like manner* (that is *also* or *likewise*, a common use of the expression "in like manner,") be liable to all just debts, &c. It tends to strengthen me in this opinion, when I observe, that in the

British statute 47 Geo. III., ch. 74, passed for securing the payment of the debts of traders, a reference is made in the same spirit, as I conceive, and for the same purpose, to the common law liability of lands to debts due by specialty. By the arrangement of the language (as the whole statute is more accurately and carefully penned), that reference *cannot* be so construed as to make it apply to the mode of pursuing the remedy, and yet the legislature have thought it proper to make the reference for no other purpose than that for which it strikes me they intended to make it in the 5 Geo. II.

It is enacted, that when any person "who was a trader " within the bankrupt laws shall die seized of lands *which* " *before the passing of that act would have been assets for the* " *payment of his debts due on any specialty in which the heirs* " *were bound*, the same shall be assets to be administered in " courts of equity for the payment of *all* the just debts of " such person, &c." What is this more than saying, that the same lands which by the common law were liable to specialty debts shall *also* or *in like manner* be liable in simple contract debts. So I read the 5 Geo. II., and then follows in the latter act the mode of making them answer to the liability, viz., through the same remedy, proceeding and process, and in like manner as personal estate.

I will attempt again to place my view of it in a clearer light, but at the hazard of becoming more obscure. The legislature were aware and meant to state, that by the law of England it was in the power of a debtor, by contracting a debt in a solemn manner under his seal and binding his heir to the payment, to impose that debt as a charge upon the lands, so that the heir could not receive the inheritance without being bound to discharge the debt, or so much of it at least as equalled the value of the land descended. To secure creditors in the colonies and to advance trade, they meant to extend this liability farther, and accordingly they declared that the lands in the colonies should be liable as well or *in like manner* for *all just debts*. If the act had stopped there it might have been thought, that as no other remedy had been afforded, the legislature meant to extend the use of the words "*in like manner*," not merely to the *liability* but to the mode of making that liability available. The act

however does not stop there ; there is no necessity therefore for thus extending the application beyond its literal import, and what is more, we find upon reading the whole clause, that it cannot be so extended without contravening the will of the legislature expressed clearly and fully.

I will now leave this examination of the words of the statute, and for the present let it be granted that the application of the words which create the doubt in this case is not so satisfactorily made out as to leave us convinced, upon the mere consideration of the statute, that lands can be sold upon an execution against an executor or administrator, and that it is necessary to resort to other evidence for clearing up this doubtful point. It is an interesting question as well as an important one, and it deserves to be investigated as fully as our means of information enable us. I observed in the argument, that the construction to which I incline was resisted upon principles and legal inferences upon which I shall remark by and by, but it was not shewn to the court, I think, that during the century that the act has been in force and in constant practice, it has received in any one colony such a construction as the defendant maintains to be the true one. If it never has, it should make one doubt that such a construction is obviously right ; however nothing indeed was produced in argument to shew what was the practice and understanding in other colonies ; but there is no want of information on that head.

In England it had long been understood as a principle, and was so at the time this act was passed, that inheritances in the plantations, in the view of the law of England, were *chattels* for the payment of debts.—Com. Dig., Heirs A. ; 2 Ven. 358 ; Ca. Ch. 145 ; 1 Vern. 453.

In the colonies in America the same idea was generally entertained, if not universally. In some colonies positive laws of their own, long antecedent to that statute, had placed real estates on that footing ; in others they were taken to be so, and had been long treated as such, either upon the assumed principles of the common law, or by force of some early colonial statute or regulation which they could not trace ; but that real estates were treated in the plantations as goods and chattels *quoad* the payment of debts, was a fact with which the bar and the bench were familiar. Dr. Burns, in

his Ecclesiastical Law, Toller in his more modern Treatise on Executors, Bacon's Abridgment, as well as Comyn's Digest, all repeat the same doctrine as I have recited above.

In the case of *Gray v. Willcocks*, which was appealed from this province to the king and council, this principle is assumed and argued upon as if it were perfectly well known and admitted. Whether lands and tenements were liable in this colony in the hands of executors and administrators to the payment of debts, was not the question in that case, nor did it come even incidentally into discussion. The action there was against the original debtor, who was still living, and the doubt that had been raised was, whether the 5 Geo. II. was in force in this province, being a colony acquired by conquest since the passing of that statute, and the English law having been introduced as the rule of decision by the colonial statute of 1792. It was decided that the statute was in force, if not otherwise yet certainly under the 18th sec. of the 14 Geo. III., c. 83, a decision by which we are bound, so that that fundamental question no longer remains to be discussed; besides, an act of our own passed in 1803 had recognized it. But it is worthy of remark that in the reasons of appeal which were delivered to the Lords of the Privy Council and signed by counsel, and which I happen to have in my possession, it is asserted by Sir Arthur Piggott and Mr. Stephen on the part of the appellant, that "independently of and antecedently to the statute 5 Geo. II., ch. 7, the liability of real estates in the colonies to be sold for satisfaction of debts by execution was a principle universally acknowledged and received in practice, and for the most part without the aid of any positive law, until some attempts to dispute it in particular colonies occasioned the passing of that act of parliament, in order to protect the rights of British creditors, and thereby to promote the prosperity of the colonies at large. The opposite rule of the English law derived from the feudal system, which never had place in America, is upheld by political considerations wholly inapplicable to the colonies, and would, if admitted there, be destructive of that commercial credit by means of which their lands are in general purchased, as well as cleared and brought into cultivation; it would not be less injurious therefore to the



“landlord than to the merchant.” These were both counsel of eminence; Sir Arthur Piggott, in his official station of Attorney-General, must necessarily have been frequently called upon to consider the acts and constitutions of the colonies, if he had not, as it is probable he had, some connection with them, for his brother, I think, was long Chief Justice of Tobago; and Mr. Stephen’s intimate acquaintance with colonial questions and interests is very well known; he was, as well as Sir Arthur Piggott, an eminent counsel at the chancery bar, and was many years Master in Chancery. In the observation that I have cited from their arguments, they stated deliberately in writing what they well knew and what they had ample means of knowing. But long before this period we find the same doctrine as plainly advanced on the bench in England, and that in the courts of common law.

In *Blankard v. Goldy*, 4 Mod. 226, Chief Justice Holt and the other judges expressly state, “In Barbadoes all freeholds “are subject to debts, and are esteemed *as chattels* till the “*creditors are satisfied, and then the lands descend to the heir*, but “the law is otherwise here,” and I will remark that in Barbadoes the law of descent of real estate is the same as in England.—5 M. & W. This was said forty years before the 5 Geo. II. was passed, which shews that in Barbadoes at least the law was already such, and that it was known in England to be such, that the 5 Geo. II. would subject creditors to inconveniences they were strangers to before, if the effect of it were to deprive them of their recourse upon the lands by proceedings against the personal representatives.

I will now examine, as far as our means of information enable us, what foundation there was in the law and practice of the colonies for the opinions thus conceived and expressed in England. In 1732, when the 5 Geo. II. was passed, Great Britain possessed the following plantations in America, which had all legislatures, and to them the statute in its very terms extended, viz., New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Nova Scotia (comprehending till 1784 what forms now New Brunswick), Jamaica, Barbadoes, the Bahamas, Bermuda, Antigua, Montserrat, Nevis, St. Christopher, and

afterwards obtained Grenada, St. Vincent, Dominica, Tobago, Trinidad, St. Lucia, Canada, and Prince Edward's Island. In the four New England states, New Hampshire, Massachusetts, Rhode Island and Connecticut, "real estate was always liable to execution for debt as assets in the hands of executors and administrators, and on a judgment against them; they therefore never adopted or practised the 5 Geo. II., it was inapplicable to them, for their law had anticipated it, and such is their practise to this day."—"In Pennsylvania the same practise prevailed from the earliest period, under their statutes of 1700 and 1709, 1 Dallas's Reports, 483; lands were confessedly a fund for the payment of debts, they were a fund made such by a positive law, and creditors may there issue exception and sell the real estate for the payment of their debts on a judgment against the executor or administrator, for it is not held necessary nor has it been usual to bring the action against the heir. It is held there to be a fund that does not actually go into the hands of the executor or administrator as assets in the ordinary form, but it is a fund made such by positive law in another form." In the last year, Mr. Biddle, a gentleman from Philadelphia, doubtless of the legal profession, was examined upon certain questions proposed when in London by the commissioners for enquiring into the practise and proceedings of the superior courts of common law, and in one of his answers he states, "that by the laws of Pennsylvania any interest of any kind in real estate, whether legal or equitable, is liable to execution; even on a judgment against an executor or administrator, the whole real estate 'of a deceased debtor' may be sold without making the heir a party, and without reference to the character of the debt."

When it is contended, that it is contrary to reason to suppose that the British Parliament, in a statute passed expressly to favour British creditors in their dealings with remote colonies, could ever have intended to subject real estate to be sold under a judgment to which the heir is not a party, it is worthy of remark, that in this populous and wealthy state they voluntarily continue to this day to leave things upon that very footing, having adopted it as expe-

dient upon their own view of their own interest before the 5 Geo. II., was passed, and continued it from that period to the present, though they had been independent of the constraint of the British Parliament for nearly half a century.

In New Jersey the colonial legislature passed in 1743 a statute essentially and very nearly in language the same as 5 Geo. II. What the practice had been there before the 5 Geo. II., ch. 7, or in the short interval between that and the passing of this colonial act, I am not aware; the probability is, that though they felt no repugnance to the principle of real estate being made chattels for the payment of debts, and even made it the practice, they were somewhat scrupulous or jealous of receiving this internal regulation at the hands of the British parliament, and preferred, as some others of the colonies did, to give effect to the desire of the mother country by passing an act in their own legislature for that purpose. Having passed an act however in similar terms with those of 5 Geo. II., and almost verbatim the same, "it followed," said Ewing, C. J., in 6 Halsted's Reports, 1, 1829, "as a necessary consequence, that the writ of *fieri facias* against executors or administrators commanded the sheriff to make the debt or damages of the goods and chattels, lands and tenements of the deceased, in the hands of the executors or administrators to be administered," and this was the form of the execution from that time down to 1799, when the act of 1743 was repealed. The executors and administrators remained without any direct control or authority over the real estate for the payment of debts, and could not of their own authority sell the real estate and apply the proceeds to satisfy the creditors. The sale was made by the sheriff under the *fi. fa.*

In New York, no colonial act had been passed on this subject before the 5 Geo. II., and none was passed after. They acknowledged the authority of the statute, and acted under it according to their understanding of its true interpretation. With them the *fi. fa.*, on a judgment against the executor or administrator, was against the goods and chattels, lands and tenements of the testator or intestate, in his hands to be administered, and this was throughout a period when they had many men eminent for their legal knowledge

on the bench and at the bar, and while the practice of their superior court was perfectly analagous to that of the King's Bench at Westminster. In 1786, the legislature of the State of New York passed an act placing the practice in this respect on a different footing, but for more than fifty years, and until this statute was passed, the practice under 5 Geo. II. was as I have stated.

In South Carolina, the lands of an intestate may be sold under an execution against the administrator, though the heir is no party, and in this colony they had the English law of descents and the right of primogeniture till they were abolished in 1799. The law has been recognized by the supreme court of the United States to be the same in Georgia. How it was in North Carolina, Delaware, Maryland, and Virginia I have not learned, but I believe that Virginia was the only one of these four in which real estates were not made *quasi chattels* for the payment of debts, *anterior to the passing of 5 Geo. II.* For most of the information respecting the practice and state of the law in these countries, which are no longer colonies of Great Britain, I rely with implicit confidence upon an authority that could not be questioned, if I were at liberty to name it. The kindness of one of my learned brothers has placed it within my reach, and, to prevent misconception, I have given this information almost literally as it was communicated.

Nova Scotia was finally ceded to England at the peace of Utrecht, in 1713. I have made inquiry, and apprehend that without doubt before they passed an act on the subject (32 Geo. II.), real estate was then considered to have been made assets for the payment of debts by the 5 Geo. II., in the same manner as personal estate was liable, and that it was considered as assets in the hands of executors and administrators to answer in common with the personal estate for payment of the debts of the deceased. In 32 Geo. II. their legislature passed an act, which they amended in 34 Geo. II., and by these acts authority is given to the governor and council, upon the application of the executor or administrator setting forth the insufficiency of the personal estate, to decree the sale by the executor or administrator of such part of the real estate as may be necessary and



convenient. In neither of these acts is any notice taken of the heir, or any provision for making him a party ; and according to the law of Nova Scotia, as I now understand it, if the executor or administrator will not apply for leave to sell the real estate, there is nothing to prevent the creditor compelling satisfaction by execution against them, under which the real estate would be seized and sold. Such I take to have been their practice before those acts were passed, and I see nothing in those acts condemning or prohibiting its continuance.

New Brunswick, after its separation from Nova Scotia passed an act (in 1786), in terms very similar to those of 5 Geo. II., adopting indeed the words of the 4th clause of that statute down to the words—"owing by any such person to "his Majesty or any of his subjects," and then adding—"and shall be and are hereby made assets for the satisfaction thereof, in like manner as personal estates within this province are seized, sold or disposed of for satisfaction of "debts." The previous practice in New Brunswick was of course that of Nova Scotia, of which it formed a part; and when they legislated themselves on the subject, they seem to have been desirous of excluding all doubts as to the liability of lands to execution in the hands of executors, for they expressly make them *chattels* for the satisfaction of debts. This deviation of theirs from the words of 5 Geo. II., in omitting the expression that has occasioned the doubt in this case, seems on the one hand to imply an opinion, that in that respect the language of the British statute was not sufficiently explicit; while on the other hand it shews, that in this colony, possessing the law of England as their general rule of decision, it was not thought improper to subject the real estate of a deceased debtor to execution without imposing the necessity of proceeding against the heir. It is therefore not very unreasonable to ascribe to the British parliament, in an act passed wholly with a view to serve the creditors of the colonists, an intention to go the same length.

Prince Edward's Island was conquered from the French in 1758, and ceded at the peace of 1763, and by colonial statutes passed there in 1781 and 1786, the latter of which was expressly confirmed by the King in council, in 1790, the

remedy for the satisfaction of debts is placed upon much the same footing as in Nova Scotia and New Brunswick, which, from a perusal of their different acts, I take to be this: On a judgment against a debtor, his lands are liable as chattels are. After his death, if the executor or administrator is desirous of paying his debts, and finds the personal estates insufficient, he may apply to the governor and council for leave to sell the whole or a part of the real estate for that purpose, and he is to advertise the sale and proceed as the act directs; but if a creditor, from the backwardness of the executor or administrator in availing himself of this course, should be driven to urge his remedy at law, I see nothing in these acts to raise a doubt, that upon an execution against the executor or administrator, the lands would be liable, although it is nowhere said so, nor is any provision expressly made on the subject. If it were not so, this difficulty would follow, that while a plaintiff would be proceeding against the heir, with a view to get at the lands through him, the administrator might petition the governor and council, and obtain leave to sell them for paying other debts.

It is remarkable, that in none of these colonies is it made necessary to bring in the heir as a party, nor is any notice taken of him while the legislature are providing in detail for selling the lands by the executor. Their act seems to me to have been passed under the persuasion, that real estate was liable to seizure and sale on a proceeding against the personal representatives, and the object appears to have been to prevent the detriment to the estate which must follow from allowing no other mode of applying the lands to the satisfaction of debts than through the compulsory process of an action.

In Lower Canada, whatever may have been the course in the interval between the cession in 1763 and the passing of the British statute 14 Geo. III. c. 83, the statute of 5 Geo. II. was not required to be resorted to after the latter statute had restored to them their law of Canada as it prevailed before the conquest. It was of no importance, I mean, to the interest of creditors, because their system of law threw the real and personal estate into a common fund, and sub-

jected it to the same course of administration, both as to payment of debts and ultimate distribution. Without the aid of the statute, therefore, the creditor got all that the British Parliament could have intended to give him: he obtained satisfaction from the real estate by the same remedy and proceedings by which he could reach the personalty. But the fact that the practice continues thus in Lower Canada, even with respect to lands not held by soccage tenure, and therefore subject without reservation to the Canadian law, proves that according to the construction of the 5 Geo. II. in their courts, the necessity is not imposed of proceeding against the person possessing the beneficial interest in the real estate, subject to the claims of creditors, because otherwise the undoubted obligation of the statute upon the colony must have drawn after it the necessity of such a proceeding. If, according to the statute, lands are only to be liable upon the same remedy which in England lies on the specialty of a deceased debtor, a proceeding, on the same principle, must be adopted in case of a devise or against those on whom the succession to the real estate would devolve in Lower Canada, whether it may have been distributed among many, or devolved according to the English mode of descent upon the heir of the intestate.

To turn now to the West Indies. In Jamaica, in 1751, an act was passed, enacting, that in all actions and suits at law to be commenced against any person, or his, her or their executors or administrators, and judgment thereon obtained in the supreme court of the island, in case *nulla bona shall be returned*, it shall be lawful for the plaintiff at whose suit such execution issues, to issue a writ for the sale of defendant's lands.

[Here the Chief Justice read a summary of the laws of the different islands on this point, which see.]

On a review of the whole question, then, it presents itself in this light:—According to the doctrine of the English law, real estates in the plantations are regarded in the same light as personal assets for the satisfaction of debts. In almost every colony the prevailing practice, before the 5 Geo. II., was to treat them on the same footing; the positive laws of most of them either made them liable in that manner or

recognised that they were so. But in Jamaica and Virginia creditors had not this facility and security for recovering their debts. These colonies claimed to have their lands exempt from sale under execution, and they would pass no laws to make them liable. British merchants trading in those colonies petitioned to have this inconvenience removed ; and parliament, knowing and avowing their knowledge that it was only in some colonies that greater facilities than already existed were necessary for the protection of creditors, passed the statute in question. It is incredible to me that parliament can have intended to pass an act which, while it was professedly designed to remove inconvenience in *some* colonies, should have subjected creditors in all the rest to difficulties and disadvantages which they had never before sustained, and which, with respect to all the debts that had been before contracted, it would be inconsiderate and unjust to impose upon them. Nevertheless, it is contended that the effect of the statute is to preclude the possibility of obtaining satisfaction of a debt from real estate, unless the heir and devisee are made parties in the colonial courts, which may be in many cases impossible, and in others may tend to ruinous delays.

Persuaded that this could not have been the intention of the statute, I naturally enquire what construction it received at the time, and how it has been acted upon during the century it has been in force. The result of every enquiry, where information has been obtained, shews that the statute has been understood to authorise recourse against the lands upon a judgment against the executor or administrator.—Contemporaneous construction is always important. Long uniform method of acting upon a statute is also material. I cannot but know that in the State of New York, for instance, many eminent lawyers, and many judges of respectable talents, were concerned in carrying this act into effect for more than fifty years ; and there and in the other colonies and islands, property of immense value must have changed hands by virtue of a proceeding which the defendant here contends cannot consist with the statute. If in any colony an heir or devisee has succeeded by appeal to the King and Council, in establishing the prevailing construction to be



erroneous, the practice must have ceased. If no heir or devisee has ever made it a question in appeal, and all have acquiesced in a practice that must have affected thousands, it would argue that the construction of this statute maintained by the defendant, instead of being inevitably the proper construction, does not appear to mankind in general to be the obvious one.

Being convinced, then, that parliament did not intend that the statute should have the operation ascribed to it by the defendant, and finding my impression on that head confirmed by what has taken place in the plantations since it passed, I find it necessary to examine whether the expression in the statute upon which this question turns, is not susceptible of a construction which would support, and not defeat, the purposes of its passing; and if I think it is, I consider it right to adopt that construction, even although it might not, especially at first sight, seem the most obvious. It would be tedious to cite cases to shew that many times, in order to effectuate the apparent intention of a statute, it has received a construction inconsistent with the letter. Some cases have gone so far on this principle that I should hesitate to go to the same extent, even under the sanction of their authority; but I think it not necessary. I have explained in what manner I think the words in question may be applied, so as to agree with the concluding provision and support the object of the act, and I think it is no forced or impossible construction.

The practice and opinions in other colonies are not cited as authorities in any other sense than this, that where there is room for doubt as to the construction of a statute, extending equally to all the colonies, it is satisfactory to know what was the construction given to it by those whom it affected, when the occasion for passing it was recent, and what practice has been maintained under it to the present time.—Besides, there is some approach to authority in the practice and judicial opinions of other colonies, when we consider that in all of them, if the construction given to the statute was erroneous, it was subject to reversal by a judgment of the King in Council, which is our last resort, as well as theirs; and with respect to those colonies which have revolted this was true for more than forty years.

It now remains to state what we can derive in the shape of authority from the practice or decisions in our own courts in this colony, because, of course, that is authority which we are bound particularly to consider ; and if the fact were, that in this province there had been for a long series of years an uninterrupted practice of the statute, under the sanction of the court, as there was, for instance, in the colony of New York, and more especially if sustained by judicial decisions, it would have been proper, I think, that we should defer to the judgments of our predecessors, and leave them to be questioned before a higher tribunal, even if we did entertain doubts of their correctness ; because, if in questions admitted to be doubtful, a long train of decisions and of practice affecting real estates of great value is acknowledged as authority even in this colony, there would be no ground for confidence in titles acquired under the sanction of our legal tribunals. But it seems to me the point may be fairly regarded here, notwithstanding all that has taken place, as *vexata questio*.

Taking up the enquiry from the time we became a separate colony (i. e., from 1791), it appears that little use was made of the 5th Geo. II. for some years, from a doubt that was early entertained whether the statute had not ceased to have any application whatever in Upper Canada, in consequence of our adoption of the law of England by the colonial act of 1792. The issuing of execution against the lands, even in the hands of the original debtor, was obstructed by these doubts till the year 1804, when the case of Gray v. Wilcocks occurred, and suspended all proceedings under the statute during the several years in which it was pending.— That was ultimately decided in appeal in 1809 ; and the application of the 5th Geo. II. to this colony being then no longer doubtful, it is frequently resorted to. In 1810, I believe, the first writ of *fi. fa.* was sued out against the lands, upon a judgment against an administrator, in the case of Gray v. Ruggles, administrator. From that time it became an ordinary practice, and passed unquestioned in the courts till 1821, when in the case of Wycott v. McLean, administrator of Robinson, the question we are now considering was first raised. That was an action of assumpsit on the

common counts; the defendant pleaded *plene administravit*, according to the English law. Plaintiff replied, that though true it was that defendant had fully administered the goods, yet that Robinson at the time of his death was seised of lands within this province; and that said plaintiff being a subject, the said lands were at the time of commencing the action subject to satisfy the damages sustained by the plaintiff by reason of the non-performance, &c.; and to this plea plaintiff demurred generally. It will be remembered at the bar, that the case, from particular circumstances, was very slightly argued. The court gave judgment the same term in favour of the defendant. The puisne judge decided that the plaintiff could only obtain satisfaction from the lands, from a proceeding against the heir, as in England. The Chief Justice, who had been on the bench since the court was created, dissented, and considered lands liable to execution upon a judgment against the administrator. Of course, although the decision of the majority disposes of the question, for the amount in litigation was only 50%, and admitted of no appeal, it was not so satisfactory a judgment upon so important a question, as it would have been if it had been deliberately argued at the bar, and the judges had been unanimous in their opinion; and especially when it is considered that the decision was against the legality of a practice which had been openly pursued for ten years or more. Many estates, and some of great value, had been sold under execution against the personal representatives of deceased debtors, after being advertised in the official gazette for months, and upon execution having according to law, at least a year between a teste and return; in all which period the heir or devisees might have moved to set aside such executions, if they thought them illegal. And what is more than this, ejectments had been sustained by purchasers under such titles. I was myself counsel in an ejectment case of *Alison v. Dunham*, tried at the assizes in Brockville in 1814, in which the title produced at *Nisi Prius* was a sheriff's deed upon a sale under an execution and judgment against the administrator of a deceased debtor. The judge allowed this title to pass without question, at least upon this point raised here. There were other legal objections taken,

which occasioned the cause to go off upon a case stated; and on this special case, it came afterwards before the judges in term, and the verdict of the jury for the plaintiff was confirmed; which makes this case the stronger, because the particulars of the title were before the court in banc. The decision of the court in Wycott and McLean having shaken the former practice, writs against the administrator were no longer taken out. Indeed, the clerk would not have issued them. In 1825 the case of Goodfarne ex dem. Ruggles v. Carfrae, brought the question again before the court.—Ruggles was son and heir of a debtor, whose lands had been sold under an execution against the administrator, and Carfrae was the assignee of the purchaser—he had paid the money and had been in possession; nevertheless it was determined that, in consequence of the former decision in Wycott v. McLean, the plaintiff must prevail. The case was tried at Nisi Prius by one of the judges who had concurred in that decision, and under his direction a verdict was rendered for the plaintiff. Before the argument which followed in term that learned judge had gone to England; and the court being composed of the Chief Justice, who had dissented in Wycott v. McLean, and one of the puisne judges, who had concurred in that decision, they refused to disturb the verdict—the Chief Justice referring the party to his remedy by appeal, and declaring that he considered the law to be now settled by the case of Wycott v. McLean. Thus the titles of all who had purchased under executions issued against executors and administrators received an additional blow.—The value of this property was not sufficient to sustain an appeal to England; and the only consequence that I am aware followed from these two decisions was the continued suspension of the former practice of issuing writs against the personal representative. I believe no one had in the mean time attempted to get at the lands through a proceeding against the heir on a simple contract debt; except that in 1823 it was attempted in the case of Patterson v. McKay to obtain a remedy by *sci. fa.*, brought against the heir upon a judgment against the administrator, after *nulla bona* had been returned to an execution on that judgment. It was an attempt made to carry the 5th Geo. II. conveniently into



effect, after the new construction had disabled the plaintiff from taking execution against the lands in the hands of the administrator. The court determined that it was not competent to the plaintiff to proceed by *scire facias*, there being no privity between the administrator and the heir. They referred the plaintiff to his original action against the heir. In 1828, being then at the bar, I adopted this proceeding in a case of Forsyth v. Hall, heir of Hall, as the only means of obtaining satisfaction of a large debt due upon a merchant's account against the ancestor. I was driven to it as the only remedy which I could attempt, after the former decisions.—I framed a declaration against the heir upon the simple contract debt of his ancestor; and the pleadings which followed brought again before the court the question, whether lands were thus made liable by the 5th Geo. II., or whether they were not rather made as personal assets, and liable in judgment against the administrator. By the time this question was presented for discussion, the court was composed of different judges, who had never given an opinion on this question, and all the judges who had done so had retired.—It happened that Mr. Justice Macaulay and myself, who had been recently appointed, had been concerned in the case of Forsyth v. Hall, and we therefore declined giving a judicial opinion. Mr. Justice Sherwood, who alone was at liberty, entered very elaborately into the question, and decided against the construction latterly adopted; so that the plaintiff was defeated in the remedy he was seeking against the heir; and the many titles which depended upon the legality of the former practice were by this last decision again confirmed. So stands the question in this colony. There have been decisions on both sides, but never from a full bench on either side. The last decision accords with a long practice, grounded on an assumed construction which intermediate decisions had adopted; and there has been no recourse to a higher tribunal. Under these circumstances, I feel that we ought to regard this as still an open question; and upon a point which affects the titles of many inhabitants of this colony, acquired in the manner I have stated, I think it is just that we should give our judgment upon the broad merits, and not hold ourselves precluded by the former judg-

ments of this court, which have in no case been unanimous, and have not been consistent.

The case, indeed, has been discussed at the bar as if the question were open; and, in addition to the arguments drawn from the words of the statute, it has been urged, that to allow real estates to be sold without making the heir a party to the proceeding which is to deprive him of his inheritance, is contrary to the principles of the common law of England, and contrary to natural justice; and that, besides, unless it is allowed that the executor or administrator can dispose of the lands as in a course of administration to pay debts (which it has not been determined or pretended that he can do), there is no alternative but to allow the heir's estate to be disposed of under the disadvantages of a forced sale, and the accumulated charges of an unavoidable lawsuit. The executor, it is argued, may confess a debt when none is due, or he may neglect to defend a suit from an utter disregard of the heir's interest, who will thus lose his inheritance without the possibility of relief. I think there is a great deal of reason and truth in these objections, in a colony whose laws respect, as ours do in general, the right of the heir to the full extent of the common law of England. But to allow them to be decisive of this question would be, in my opinion, to take too superficial a view of the case.

The law, upon general principles, assumes that executors and other persons entrusted with legal powers, will execute their duties rather than abuse them. *Nullum iniquum est injure præsumendum.* Against fraudulent collusion between them and creditors, to the prejudice of persons ultimately entitled, there must be redress, unless in any colony its jurisprudence is wholly defective, which parliament had no ground to assume, particularly since each colony had received from the mother country a power to make whatever laws were necessary for its welfare. Where security is exacted upon the grant of administration, that tends to ensure a due administration, and it gives a remedy against an abuse of the trust. Besides, a debtor may leave personal property to the value of thousands, in the distribution of which his relatives have an absolute right to share; and although this may be dissipated by the negligence of the administrator, or the

dishonesty of creditors advancing unjust demands, it has never been pretended that, on that account, the relations whose interests are decidedly affected by the result of actions against the administrator, either must or can be parties in those actions; the justice of the cases is the same. If the administrator is honest, he is more likely to be able to defend the estate effectually against creditors than the heir, because he is privy to all the personal transactions of the deceased debtor, and has the custody of his documents, books, &c.

But it seems to have been naturally inferred and well understood in other colonies, that it was the business of the colonial legislature to mould their own laws and proceedings so as to make the operation of the statute just and convenient. The British parliament had in view the single object of advancing trade by securing the British creditor. They could not be supposed to be aware what were the local laws and judicial arrangements of every one of fifteen or twenty colonies, respecting the disposition and administration of estates. We find from the Report of Mr. Dwarries upon the Laws and Courts of the West India Islands, that it is no easy matter in some of them to learn what the statutes are, even upon the spot; for, in some islands, they exist only in manuscript. If, therefore, it had been attempted in 5 Geo. II. to provide for all possible consequences *within* the colony, by prescribing a system that should protect the persons entitled to succession, the provisions must have been multifarious, and their bearing upon the existing state of things in each colony would have been uncertain, and would have been found unsuitable. It is more likely and more reasonable to conclude, that that was left to be managed by the colonial legislature, especially since in many of the most important colonies the laws which were in force did not embarrass the creditor by any attempt to protect the heir, but left him simply to succeed to the estate after debts were paid—as Lord C. J. Holt explained the law to be in Barbadoes before the 5th Geo. II., and as it has been suffered to remain in Pennsylvania to this day. I grant that as estates here are really valuable, and as we have had the good sense happily to adopt the common law of England, it is highly fit that more respect should be paid to real estate than to goods and

chattels, and that the rights of heirs and devisees should receive every protection which we can give them without contravening the 5th Geo. II. There is no reason why we may not enable administrators to sell, without the necessity of awaiting an action, nor any difficulty in providing for such an investigation as shall ascertain the necessity for their selling. We may pass such acts as they have passed in Nova Scotia; that we have not done so, is no reason why the British creditor should not have whatever benefit the 5th Geo. II. was intended to give him. Let us now, on the other side, consider how the British creditor is affected by a construction which should give him no recourse against lands unless by bringing an action against the heir, or according to circumstances, against the heir and devisees. If the heir were a minor, I am not prepared to say that upon any principle we could allow proceedings to be carried on against him until he became of age, before which time half the negroes on the estate might die in course of nature. The reasons which, according to some authorities, were given in early times for suffering the parol to demur, apply as little in England now as they do in this country, and yet in England the privilege is still extended to the heir during his infancy; and again, the reason which is given by other authorities in England for allowing this privilege, namely, that the heir may have a good defence to his action, which by reason of his infancy he cannot urge, certainly applies here as forcibly as there; added to which, we have the law of England by adoption, of which this principle is part, and there is nothing in the 5th Geo. II., or in any other statute, to exclude it.—Gilbert on Executors. Besides this delay, there would frequently arise difficulties from the absence of the heir or devisee, or of some one or more of the devisees. When this statute was passed, it was very notorious that in many of the colonies, and more especially in the West Indian Islands, the planters were in the habit of retiring to England with the fortunes they had acquired, their children were sent there to be educated, and of those who from family connection were most likely to be devisees of a resident planter, a greater number, I imagine, would generally be found resident in England or Scotland than in the island which con-



tained the estate. If parliament meant to impose the necessity of seeking a remedy against the heir and devisee, they must have known that they were holding the British creditor to a proceeding which in very many cases would be impossible, and that, even with respect to negroes, a description of property which in all the colonies was notoriously treated and regarded as chattels for the satisfaction of debts. The supreme jurisdiction of the courts in England may be exerted so as to obtain a remedy in chancery, at least where those to be affected by their proceedings reside without the kingdom, but a colonial court cannot extend its powers for any purpose beyond the limits of the colony, and when it has been attempted to do so, by declaring debtors who have never resided in that colony amenable to their process, the attempt has been adjudged in England to be illegal and ineffectual. It is difficult to believe that parliament, intending to retrieve credit and advance trade in the colonies, should have passed an act which must subject the remedy, even as it respects negroes, to these difficulties and delays, when they must have well known that in some of the principal colonies, matters were on a much better footing already, the Court of King's Bench having declared, forty years before, that in Barbadoes "all freeholds are subject to debts, and are esteemed as chattels till the creditors are satisfied, and then "the lands descend to the heir." Again, if the words of the statute are to be so construed, that creditors can only obtain satisfaction from real estates of deceased debtors in the colonies by pursuing the same remedy as in England, in cases of debts due by specialty, then, for anything I can see, the remedy would be lost to the creditor entirely, with respect to real estate that might be devised for raising portions pursuant to a marriage contract, because estates so devised are exempt in England, by the 4th sec. of 3 W. & M., ch. 14. Other disadvantages and difficulties will occur upon reflection, to none of which it seems to me it could have been intended by parliament to subject the British creditor unnecessarily, and for the first time in most of the colonies, for the sake of guarding the right of the heir by provisions which the people of the colonies, legislating for themselves, had not thought suitable to their condition and interests.

It is said that parliament never could have designed anything so unjust, as to subject the real estate of the heir to be sold without bringing him in to answer; but in the first place, the parliament and the courts in England had been accustomed to regard real estate in the colonies as testamentary property, and they knew that the colonists had themselves in general placed them on the same footing; and in the next place, if further provisions were wanting to secure the interests of the heir, which in some of the conquered colonies retaining the civil law would be wholly out of place, it was an internal regulation for the colonial legislature to settle, and if they made no provision, the heir would be in no worse situation than the person entitled to succeed to the personal property, whose interests may be ruinously compromised by executors or administrators in actions, in which nevertheless such persons cannot intervene. It is further urged, that to allow the estate to be sold upon an execution against the executor, while at the same time the executor has no direct power of alienation over the land, is an anomaly and is manifestly unjust, as it leads to the inevitable sacrifice of the estate. The answer to that is, that if in any of the colonies they have not a power of disposing of the real estate of the deceased, that power can be given, and it has been given in Nova Scotia, for instance, and under such limitations as the colonial legislature, with a knowledge of their own judicial system, can more conveniently devise, than the British parliament could have done if they had attempted to venture upon such details; and further, when this power is not given, and if we admit it not to exist by implication and in consequence of the 5 Geo. II., still such a state of things would not be an anomaly. When the heir and devisee are sued in England upon a specialty debt, one of the parties at least, i.e. the heir, is made the object of the proceeding in order to get at the land, although he has not the power of stopping the proceeding by aliening the land and satisfying the debt from the proceeds, because being devised it has not descended to him; and he in that case, as the executor in this, is made a party to a suit on account of a debt, which he cannot avert by any satisfaction from assets at his disposal.

In *Ives v. Hind*, 1 Ves. 294, it is admitted by Lord Cam-

den, that a man may by a special clause in his will provide, that a term for years devolving upon his executors shall not be alienable by them. Nevertheless, as a creditor cannot be affected by such a restriction, the lease is still assets and must be subject to execution against this executor, and he must submit to the recovery by judgment and execution, for obtainingsatisfaction from assets which he cannot voluntarily dispose of.

Further, a covinous conveyance of the land by an ancestor, to defeat the claims of his specialty creditors upon his real assets, is vain, and notwithstanding such conveyancethe lands remain parcel of his estate at the time of his death.—Shep. Touch. 66. And also, if the heir himself makes a collusion and fraudulent conveyance to defeat the creditor of the remedy upon the lands descended, such fraudulent conveyance is void by the statute of 13 Eliz., and satisfaction can be obtained from the specific lands descended.—2 Leon. 11; Plow. 441; Popham, 155; Bro. Dett. 238; 5 Rep. 60. Now in these cases the heir has no power of disposition over these lands, because the covinous alienation is void only as against creditors; it was binding upon the ancestor, and is binding upon him as the heir. Creditors therefore may pursue their remedy against the heir, who must in this case be the passive object of the suit as much as the executor under the 5 Geo. II., for it is only the termination of the suit which ascertains the lands to be still his and still liable to execution, and it is no obstacle to this to say, that the creditor is seeking a remedy by compulsion, against one who cannot voluntarily satisfy his claim out of the fund he is pursuing.

To say that the real estate shall be treated as personal estate, *quoad* the satisfaction of debts, and yet retain its character of real estate, is not to set up an anomaly perfectly unknown to the law of England. By the stat. 29 Car. II., ch. 3, and the subsequent statute of 14 Geo. II., estates *pour autre vie* are turned into personalty for some special purposes, but the nature of the estate is nevertheless unaltered. They cannot be conveyed except by deed as other real estate, although not descendible. They could not be distributed after debts paid, notwithstanding they were made assets by the 29 Car. II., until 14 Geo. II. made them distributable,

and the power of the executor or administrator over them is (as in the case before us) derived not from the administration committed to him or his character of executor, but from the statute.—7 Ves. Junr. 441. A careful consideration of the statutory provisions respecting estates *pour autre vie* in England, and of the consequences which have been held to follow those provisions, may indeed assist us in throwing some light on this question, and at least it will guard us against erroneous inferences in reasoning from the one to the other, if we carefully mark the difference between them.

By the common law, when a man was a tenant for the life of another, by virtue of a grant to himself only, without naming his heirs, the estate at his death, if he survived the *cestui que vie*, went neither to his heirs nor executors, but he who could first get possession of the land might keep such possession so long as the *cestui que vie* lived, and he held, as it was said, “by general or common occupancy.” When the grant had been made to a man and his heirs, the heir took as special occupant, that is, he took as being the person specially designated in the grant to occupy during the life of the *cestui que vie*. It was doubted whether, in case a grant had been made to a man and his executors or administrators, it would go to the executors or administrators as special occupants. The estate being in its nature freehold, it was objected that it could not go to executors or administrators by force of the grant. Lord Hardwicke however was of opinion that it might, and he thought it would have been assets in their hands, even before the Statute of Frauds, upon the broad principle, that if a man takes anything as executor or administrator it is assets of necessity. Estates *pour autre vie*, standing on this footing at common law, the 29 Car. II., ch. 3, (Statute of Frauds) made this change in their nature, indeed it rendered them devisable, which it had been held they were not before, not being estates of inheritance; and it further provided, “that when no devise thereof shall be made they “shall be chargeable in the hands of the heir, if they shall “come to him by reason of the special occupancy (that is, if “he be designated in the grant as the person to take after “the first tenant,) as assets by descent, as in case of lands in “fee simple, and in case there be no special occupant thereof,



“ they shall go to the executors or administrators of the party  
 “ that had the estate thereof by virtue of the grant, and shall  
 “ be assets in their hands.—Cro. El. 805.” Now by this act, in  
 the first place, general occupancy was destroyed, that is, the  
 right of any person to take possession as first occupant, when  
 neither heir nor other special occupant was designated, was  
 taken away, and then it was provided, that the estate, when it  
 was not devised away, should in some shape be made available  
 to the creditors of the deceased owner. Where the heir could  
 take as a special occupant, it was to be in his hands assets by  
 descent, like lands in fee simple or real assets. Where neither  
 the heir nor any other person took as special occupant, the  
 estate was to go to the executors or administrators, and to be  
*assets in their hands* as personal assets. Estates *pour autre vie*  
 rested on this footing till 14 Geo. II., ch. 20, and in that  
 interval various questions arose as to their nature and quali-  
 ties when they came to the executor or administrator, and I  
 take it to have been determined, that these consequences fol-  
 lowed from the provisions which had been made respecting  
 them by the 29 Car. II., and which I have stated in the very  
 words of the statute. As the statute said they should be assets  
 in the hands of the executor or administrator, they were held  
 to be assets *for the payments of debts*, but not to pay legacies,  
*and not assets for distribution*. It was held that the term  
 “ assets ” implied a fund to satisfy debts, and that being made  
 assets in the hands of executors, they were therefore *ex vi*  
*termini* liable in their hands to satisfy the debts of the tes-  
 tator or intestate, and liable to sale under a *feri facias* as  
 other assets in their hands were; but it was only the demand  
 of a creditor that made them assets, and after their demands  
 were satisfied, or if there were no debts, the executor or  
 administrator was considered to have taken and was allowed  
 to hold as special occupant, and then he held the estate pre-  
 cisely as he would have done if he had been designated in  
 the grant. So that we see here parliament created a state  
 of things in England *in respect to estates pour autre vie*, bearing  
 much resemblance to that which they created by the 5th  
 Geo. II. in the colonies, in regard to real estates generally,  
 but there is not a perfect similarity. They made the estate  
 devisable like a fee simple. If it was not devised, and the

heir took, it was in his hands real assets; if it came to the executor, it became in his hands assets, personal assets, for the payment of debts; but except when creditors were in view, the executor or administrator held the estate precisely as the first tenant had; that is, in its true simple character of an estate *pour autre vie*. Now while this state of things continued, it seems to have been admitted, that if an executor or administrator pleaded *plene administravit* while he had an estate *pour autre vie* in his hands, the issue should be against him—Lord Raym. 96, and reasonably enough, because the estate was his, he had a disposable power over it; if there were debts, he must pay them, because the statute made it assets; if there were no debts, he held it absolutely as his own—the heir had nothing to say to it. To allow him, therefore, to succeed on *plene administravit*, when he held such an estate, would have been allowing him to say, that instead of applying the assets, as *he could do* and ought to do, to paying the debts, he would keep them for himself.

But in our case, under 5 Geo. II., the case is widely different. That statute does not, like 29 Car. II., declare that the real estate shall *go to the executor or administrator* (whether there are debts or not), and in case of debts be assets; but it says that it shall be liable to *debts* of every description, and be *assets for their* satisfaction, and subject to the same remedies in any court of law or equity as goods. Here, if for form the estate is at any time to be regarded as in *the hands* of the executor or administrator, it is only when there is a debt to be paid to a British subject, and then it is liable to *that debt*, and assets for its satisfaction, and subject to the same remedy in courts of law or equity as goods. In any other circumstances the estate is in heir. This does not appear to me to give to the executor or administrator a power of disposing of the real estate or of administering it, even for the payment of debts, otherwise than through the instrumentality of a court, and he certainly has no estate that he can hold for his own benefit; and, if so, shewing that there are real estates which he cannot convert, and which cannot even be made liable unless the plaintiff is a British subject, a fact which lies in the knowledge of the plaintiff rather than of the defendant, ought not, as it seems to me, to conclude the defendant upon the issue of *plene administravit*. 559 B

If I thought it doubtful whether the administrator could or could not administer real estates, converting them by his own act into money for the payment of debts, I should not decide that he had such an authority; for, during the forty years that we have had a constitution, such a practice has never been attempted, and the law has been always understood and assumed to be otherwise. In England, an administrator having an estate devolved upon him *pour autre vie* under the statute, has the entire *jus in re* and *ad rem*, and can undoubtedly convey the estate; but he must do so as other owners of real estate, by deed. But that an executor or administrator in this country could either convey real estate without deed, or could make a deed of real estate under the 5th Geo. II., is what I am not prepared to grant. The 14th Geo. II. chap. 20, making estates *pour autre vie*, which have come to administrators, liable in the same manner as the personal estate of the testator or the intestate, has no other bearing upon our present enquiry than as it serves to shew, that the having made them assets by the former statute did not make them to all intents and purposes the same as the other assets which came to their hands. The 29th Car. II. says, that an estate *pour autre vie*, when there is no special occupant, shall "go to the *executors or administrators, and be assets in their hands.*" It is therefore placed in their hands expressly, whether there are debts or not. The 5th Geo. II. does not say that real estate shall go to executors or administrators for paying debts, or for any purposes, or that it shall be assets in their hands; nor does it mention executors or administrators, nor allude to them, but it says, "it shall be *assets* to satisfy all debts;" and how are these assets to be turned to the payment of debts? because assets is a word of double meaning, they may be real or personal. The statute tells us, "they shall be subject to the same remedy, proceedings and process for seizing, extending, selling, and "in like manner as personal estates are sold." The remedy, with respect to the personal estates, we know, is by judgment and execution against the executor or administrator; and we therefore know that the creditor must get his judgment and execution against the executor or administrator, and then and not before, the real estate becomes assets, to

be sold, &c., in like manner as personal estates; that is, they become personal estates, under the operation of the execution; but it is the execution that makes them so, together with the statute. I see nowhere an authority in the executor to administer them, and he certainly does not hold them as an executor would an estate *pour autre vie*. The difference between the two statutes is great and striking.

I cannot say I have felt pressed by any of the inconveniences which it is said must follow from the acting upon this statute, construing it as I construe it, and supposing nothing done in the colony to make its operation square with the system we have adopted. Nor does it appear to me to be to the purpose to urge that to sell real estate upon judgments against the personal representative is inconsistent with every principle of the law of England. The statute is meant to be a departure from the law of England. One or two colonies had advanced, under the common law of England, a claim to have their real estate exempted from the satisfaction of any debts not due by specialty, and parliament felt it expedient to prevent the application of this principle in the colonies. It is equally against the common law of England, that lands should be actually sold under a *fiери facias* like goods and chattels, and that the debt, for the satisfaction of which they are sold, should be proved by an affidavit sworn in a distant country, that is, by evidence taken *ex parte*, which the defendant has no opportunity to cross-examine. In passing this statute, parliament was necessarily obliged to use very general language, because the particular technical terms which would serve to demonstrate their intention if they were passing a measure for England might in some of the colonies be inapplicable. Executors and administrators were not necessarily to be found in the judicial arrangements of every plantation, nor was it to be assumed, that the distinction between the heir and personal representative existed in all of them. It is a distinction not recognized by the law of some of those European powers from which several of the colonies have been acquired by conquest; and although we have in this colony (which has become a province of Great Britain since the 5 Geo. II.,) very wisely taken to ourselves the law of England as our rule of decision, still we cannot



adopt, in consequence, a rule of construction in opposition to the spirit and intent of the statute. We have not thereby varied our situation in respect to this statute, nor can we restrain its provisions, under pretence that they are inconsistent with the law of England which we have adopted, but which we might or might not have adopted as we pleased. To contend that we can alter the application of the 5 Geo. II. in any manner to the prejudice of the British creditor by our voluntary adoption of the law of England, is to contend that we can indirectly abrogate a statute which we could not directly repeal. Whatever may be our system of laws at any given moment, so long as the 5 Geo. II. is admitted to bind us, it must, I think, follow that whatever remedy or proceeding those laws give, for seizing and selling goods that are assets for the satisfaction of debts, the same remedy and proceeding must the British creditor have, *and in like manner* for seizing and selling the lands, for those are the terms of the statute, and they are so plain, that there could be no doubt if those words, "in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or specialty," had not been inserted. Their insertion, I will repeat, appears to me to have been intended to express nothing more than this: whereas by the law of England lands are only liable to debts due by specialty, they shall in the plantations, for the advancement of trade and the retrieving of credit, be in like manner liable there, that is, they shall be liable *likewise*, or *also* to debts of every description. To give to the words "in like manner" a construction that would bind the creditor to pursue his remedy for obtaining satisfaction, *in like manner* as upon a specialty in England, is directly repugnant, as it seems to me, to the last words of the clause, in which parliament subjects them to the same remedies and proceedings as goods and chattels; and clearly inconsistent with the averred object of this remedial act, which is to afford facilities where they were required, not to impose restrictions where none existed. And indeed, if the words "in like manner" notwithstanding the context, must be literally construed to mean, that lands shall be assets, to satisfy all kinds of debts, when and where they are assets, or *precisely as* they are assets in England to satisfy debts due

by bond or other specialty, then they would only be liable to satisfy simple contract debts in which "*the heir is named*," for it is only where the heir is named in the contract that they are liable to satisfy debts due by specialty. It seems to me very improbable that parliament could intend to enact, that the remedy for reaching lands in the colonies to satisfy the debts of deceased debtors should be the same as was given by the law of England (not by the law of each respective colony,) for the satisfaction of *debts due by specialty*. By the law of England the heir and devisee are to be sued. I am not clear how you would apply this remedy in Trinidad, St. Lucia or Demarara, where, I suspect, persons answering precisely to our ideas of heirs and devisees of real estates may not be found to be forthcoming under the Spanish, French or Dutch law, which is administered in those colonies respectively. They meant, I think, nothing more than to state by way of illustration the extent of the intended liability in all cases, by referring to a case in which by the law of England estates are liable to the *full value*, rather than to give us the English mode of administering that law as the only medium by which the liability could be enforced. And they seem to me to place this intention beyond doubt, when they afterwards provide, that lands shall be subject to the same remedy, proceedings and process for seizing, extending, selling and disposing of them, and in like manner as goods and chattels are seized, &c. Does not this entitle the creditor to the same kind of execution as the "process" upon which they are to be seized and sold; to the same form of action and pleading to judgment as the "proceedings" by which that "process" can be obtained, and the same power of establishing his claim by action against the executor or administrator, as the "remedy" for ascertaining his debt by a judgment? In point of feeling, I approve of that respect for real estate, and that tenderness for the right of the heir, which would incline every lawyer, judging of this act simply by the standard of English law, to give to this questionable line in the 5 Geo. II., the construction which the defendant here maintains. I will go further and say, that considering, on the one hand, in how limited a number of cases British merchants are direct creditors of the inhabitants of this inland

colony, and on the other how important it is, that in a province which must be chiefly agricultural, the proprietors of estates should be encouraged to set a just value and feel a secure confidence in their possessions, I might prefer that we were exempt from the operation of the statute in question; but we must study to prevent any feeling of this kind from influencing our judgment, we must look at the statute as it stands, and if we find its provisions not clearly expressed or apparently contradictory, we must consider the occasion of passing it, the remedy that was wanted, and the effect which the statute as intended to answer; as was remarked by Mr. Justice Blackstone in the case of *Mason v. Vere*, 2 Bl. Rep. 1311, upon the construction of the Insolvent Debtor's Act: "in these temporary acts made on the spur of the occasion, "the best interpretation arises from their history; the legislature intended a *larger* and more *liberal* relief *than before* "for all persons in insolvent circumstances; the confining "the clauses to traders would make the relief more narrow, "and extend it to fewer persons." I cannot persuade myself to the conviction, that all the colonies to which this statute applied acted erroneously at the time and persevered in that error ever afterwards, and that such error, affecting the titles of numerous heirs and valuable estates, can have gone on without question or remedy for a century. It is true that in most colonies, but not in all, they have adopted enactments since, which do not leave the question pending upon the construction of the British statute; but I think it obvious and reasonable to conclude, that in these colonial acts they have conceived themselves to be coinciding with the spirit of the British statute, and that they must have appeared to the king and council in that light, for they would scarcely have confirmed throughout a century enactments at variance with the declared sense of the British parliament.

As to the argument, that it is unreasonable to suppose that the British parliament, with their notions of the nature and value of inheritances, could have intended to pass an act, by which the estate of an heir should be made liable to sale to satisfy a judgment to which he was not privy, it is sufficient to refer to the statute 9 Geo. IV., ch. 33, the title of which is, "an act to *declare* and settle the law respecting the liability

“of the real estates of British subjects and others situate within the jurisdiction of His Majesty’s Supreme Court in India, as *assets in the hands of executors or administrators* to the payment of the debts of their deceased owners.” In the provisions of this declaratory law, parliament has at this late day actually established in India in unequivocal terms that very system of dealing with laws of deceased debtors for the satisfaction of debts, which it is contended they could not have contemplated when they passed the 5 Geo. II. So far as principle is concerned this statute is certainly declaratory of the sense of parliament, and if we could ascertain what was the language of the positive laws of which it declares the construction, it might prove to be an express authority upon the very question before us. It clearly can have no reference to the 5 Geo. II. specifically, because that statute is confined to the plantations in America. I have not been able to find that a similar act has been passed by parliament to apply to the British possessions in India, nor do I find in the 13 Geo. III., ch. 63, or the 5 Geo. III., ch. 155, or in any other British statute, any provision bearing upon this point. I should suppose that either in what are called the charters of justice which had been issued for the several presidencies, or in the acts of their governors in council, something has been ordained with regard to the sale of lands in execution, and that this recent statute declares the construction of that charter or ordinance; there may however be some act of the imperial parliament on this head which has escaped my search. There is nothing that I am aware of in any other British statute binding upon this colony, or in any statute of this colony, that can decisively affect this question of construction, unless it be our provincial act of 1803, which provides, “that goods and chattels, lands and tenements shall not be included in the same writ of execution, nor shall any such process issue against the lands and tenements until the return of the process against the goods and chattels.” If we believe that the legislature here meant to extend this protection, in accordance with the spirit of Magna Charta, to lands held by the heir as well as while they remain vested in the original debtor; and if we believe further, that they could extend this protection notwithstanding the 5 Geo. II., ch. 7,



then it is not unimportant to observe, that after the death of the debtor, no execution against his goods and chattels can be returned, because none can be had except upon a judgment against his executors or administrators, and if they plead *plene administravit* and succeed on that issue, the plaintiff can have no judgment except of assets *quando accidunt*, and if he can never succeed in proving on a *scire feci* enquiry that assets have accrued, he can never get his execution. I think if he prayed here judgment of assets *quando* as to goods and execution against lands, he might have it.

May not the existing liability to specialty debts, &c., be referred to for this reason in 5 Geo. II., that the heir may have *real estates* which are not liable to his ancestor's debts ex. gr. estates in trust for another, and perhaps in other cases, and they meant perhaps only to make them liable to simple contract debts in like manner as to specialty, or where they would be liable to specialty debts. *As to executors de son tort.* In England, as to estates *pour autrui vie*, a person going into possession may be held to make himself executor *de son tort*, because by going into possession he announces himself executor, and 29 Car. II., ch. 3, gives the estate to the executor; 5 Geo. II., ch. 7, does no such thing. A man by selling goods of the estate converts them and makes himself executor *de son tort*; entering on land does not convert it. Suppose no heir and the estate escheated in consequence, how could we say that lands were subject to the same remedy for seizing and selling as the goods? Parliament must be taken to have legislated with a view to the general colonial practice, so as not to create unnecessary differences; they could not easily be certain, that in the colonies there were persons corresponding to the English definition of heir executor or administrator; they therefore avoided mention of any of those terms, and used only general terms, giving the same remedy for seizing and selling them as goods, and they left it to adjust itself, except so far as was necessary to give the creditor his satisfaction.

Having thus disposed of the general question, it remains to apply myself to the pleadings in this case. In my opinion the plaintiff is entitled to succeed upon the third plea, and the defendant upon the fourth. I regard the lands as legal

assets, which in the contemplation of law are in the hands of the administrator for the satisfaction of debts, that is, to satisfy judgments obtained; the replication to the third plea I think is good, and the rejoinder bad. Whether lands are to be looked upon as in the hands of the defendant or not, they are liable to satisfy the damages as the plaintiff has averred. I do not think it is material, that the lands are averred generally to be within this province, and not stated to be (as perhaps in fact they are not) within the district whose surrogate committed administration to the defendant. —6 Co. 47, *Ilderton v. Ilderton*, 2 H. Blackstone. The surrogate did and could not grant administration of the lands; the Court of Probate, which corresponds with the metropolitan jurisdiction, could as little do it. The jurisdiction cannot be affected by the real estate or its situation, and it cannot therefore be necessary to aver that it is within any particular district, nor can it be necessary for the mere purpose of *venue*, since the *venue* will follow that laid in the declaration. The defendant, I think, must succeed upon the fourth plea, because it contains the necessary *plene administravit* as to the goods; and the adding, that she had no administration of lands committed to her, is merely idle and useless, and *utile per inutile non vitiatur*. We know she could not have had any administration of the kind, but having exonerated herself as to the goods, it was for the plaintiff to reply what was not within the knowledge of the administratrix, that the debtor died seized of lands, and that he, the plaintiff, “*is a subject of his majesty*”; for it is only British subjects who are entitled to the remedy given by the statute. *Prima facie*, I think, the ordinary plea of *plene administravit* is sufficient to discharge the executor or administrator, and it would not be reasonable or consistent with legal principles, to throw upon him the objection of averring at the peril of pleading falsely that there are no lands, an averment of which he cannot know the truth, or that if there are, the plaintiff is not a British subject, and therefore cannot obtain satisfaction from them. That there are lands, and that they are liable to satisfy debts, comes properly from the plaintiff by way of replication, as a new fact to shew why the defendant having administered all he can administer, should nevertheless not obstruct the plaintiff’s action; if the administrator chooses

to deny this he does so at his peril ; if he admits it he subjects himself to no responsibility, and the plaintiff proceeds to judgment, and obtains, as the fruit of it, the same process against the deceased debtor's lands as against his goods.

I am not insensible that incongruities must present themselves in acting upon this statute, if we take the law of England as our standard, both as to form and substance ; it cannot be otherwise. We have chosen to adopt the law of England ; that has been our own act ; it has not been prescribed to us by the same power that has subjected us to the operation of the statute in question. That statute is in itself a total and absolute departure from the principles and practice of English Law ; it is a block thrown in at random, or rather one that we are forced to admit into the structure we have erected. It is not to be supposed, that it can have found a place precisely fitted to it in all its points, so that it need not discompose any other particle of the structure ; it must require adjusting. In this very case, or in others, some unthought-of difficulty may present itself in some stage of the proceedings or under some new combination of circumstances, and possibly a difficulty such as the legislature only can remove ; there may be other difficulties, which are only apparent, not real, which require but the application of that reason which the court are authorized and bound to exert, in disentangling justice from forms which may be rendered palpably inapplicable from alteration of circumstances. At present I perceive in this case only this peculiarity ; if the plaintiff were looking to the goods for his remedy, he could only answer a plea of *plene administravit* by shewing goods and chattels within the jurisdiction over which the administration that has been granted to the defendant extends. But with respect to the real estate, it is by *statute*, not by the act of the surrogate judge, made legal assets for the satisfaction of debts, and assets liable to the same legal remedy as goods and chattels. It becomes assets when the debt is made out by the judgment, before which it was altogether uncertain whether it had not descended to the heir, so as to preserve purely and entirely the character of real estate ; the administrator never could and never can administer the real estate ; the sheriff administers it under the *fieri facias* ; the administrator could not make the existence of lands the ground of obtaining admin-

istration from a different jurisdiction; they are clearly not *bona notabilia*, the judge of probate or the surrogate cannot notice them nor give administration of them. It is then surely insignificant in what district they are situated; it is enough that they are *within the jurisdiction* of the court which issues execution against them. Upon the whole record judgment must in my opinion be given for the plaintiff; upon the demurrer arising out of the fourth plea, the defendant, as I think, is entitled to judgment for the reasons I have stated, but nevertheless upon a well known principle the plaintiff must have judgment on the record, inasmuch as it is not denied by the defendant's rejoinder that there are lands, and that the plaintiff is a person entitled to have his remedy against them. I am aware that the court are not unanimous in their opinion upon the general question, a circumstance which I regret exceedingly, considering how long it has been fluctuating; and I earnestly hope, that the question appearing to be one of that difficulty and doubt that we cannot concur in our opinion upon it, may encourage the party failing here to take the opinion of a higher tribunal, since it is most desirable that the point should be conclusively settled in the last resort. If it should be finally determined that the creditor is compelled to seek his remedy against the heir, many technical difficulties and inconveniences will be avoided in future proceedings under this statute, and some perhaps that are more than technical. I should on the whole prefer, that I could bring myself to consider that the right construction of the statute, but if I am correct in forming the opposite opinion, then the sooner the legislature are aware of that the better; for undoubtedly it will be necessary to adopt some such provisions as under similiar circumstances have been extended to India by the 9 Geo. I V., ch. 33. It follows from what I have said, that in my opinion, the plaintiff should have judgment on this record; but considering the pleadings, that the existence of any assets which the administratrix *can administer* is denied on the one hand and not affirmed on the other, I think the judgment should be special to conform to the circumstances, and should award the debt to be levied of the lands and tenements, &c., of which the intestate



died seized, and which remains liable to satisfy the debts due (a).

SHERWOOD, J., (after stating the case.—It appears to me the legal points raised by these demurrers call for the solution of the two following questions: 1st. Can an action of assumpsit be sustained against the heir? 2nd. Does the defendant's rejoinder support the third plea? In the case of Forsyth et al. v. Hall, lately decided in this court, I expressed an opinion on the first question; and I heard nothing in the learned and able argument of the defendant's counsel in this cause to induce a change of that opinion; I will therefore confine my remarks to the second question. Does the defendant's rejoinder support the third plea? The rejoinder assumes the existence of this legal principle, "that no process of execution can issue to sell the lands in an action against the personal representative, unless administration of the lands had been granted." In my opinion there is no such legal axiom. The 5 Geo. II., ch. 7, makes lands chargeable with all just debts, and subjects them to sale for the satisfaction of debts, by the same proceedings and process by which goods are sold for that purpose. The statute creates a general fund to meet the exigency of the writ of execution, by blending two distinct species of property together, and by imparting the nature and qualities of goods and chattels to lands and tenements till the process of execution is fully satisfied; lands are therefore *quasi* goods and chattels when the payment of debts is enforced by the strong arm of the law, but not at any other time; on all other occasions that species of property retains the nature and qualities peculiar to its class. In this view of the case, I think it was not indispensably necessary for the plaintiff to state the locality of the lands, for in my opinion they are liable for debts in any part of the province: the personal representative forms the medium of access to the lands, and the sheriff of the district in which the lands are situate is the agent, through whose instrumentality the law converts them into money for the benefit of the creditor. In this way the debts are satisfied, but the personal representative, in my opinion, has neither

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(a) See *Thompson v. Grant*, 1 Russell's Ch. Ca. 540.

a right to the possession of the lands nor authority to dispose of their rents and profits ; they descend to the heir or go to the devisee, chargeable under the 5 Geo. II., with the satisfaction of all just debts, by the same process and proceedings against the personal representative as the common law gives to compel a sale of the goods and chattels for satisfaction of debts. It was the practice before the passing of the provincial statute 43 Geo. III., ch. 1, to include the goods and lands in the same process of execution, not only in writs of that description, which issued from the late courts of Common Pleas in this province, but from this court also ; at any rate they might have been legally included in the same writ. After the passing of that act goods and lands could not be included in the same process of execution, and no writ of *feri facias* can now issue against the lands until the return of the process against the goods. In the present case the plaintiff admits, that the defendant has fully administered all the goods and chattels which have heretofore come to her possession, and the defendant admits that her intestate died seized of lands. Now as I consider lands precisely of the same nature when seized under a writ of *feri facias*, as goods and chattels taken under the same writ, and equally liable to satisfy debts, I think the plaintiff is entitled to judgment on the whole record, as much as if there had been a sufficiency of goods in the hands of the administratrix to satisfy the debts of the intestate.

The plaintiff's replication to the defendant's third plea alleges, that the intestate died seized of lands in this province generally, without stating the district in which they are situate, but I think the court should intend they are in the Midland District, if it should be considered at all necessary to sustain the plaintiff's action that he should shew where the lands lie. The court cannot intend the lands are in any other district, nor can the court reject the allegation as senseless ; the defendant being at liberty to deny the allegation in as general terms as it is made ; I see no inconvenience to either party. According to my present impression, I think it was not necessary to give a local description of the lands or to state their quantity, because the personal representative could neither be benefitted nor injured by such statement. Whether the lands are sufficient in value to satisfy the plain-

tiff's demand is of no moment to the defendant; she cannot be made responsible for any part of the debt or costs in consequence of the proceeding against the land which the plaintiff has elected to adopt. As relates to the defendant therefore it is a matter of perfect indifference whether the district in which the lands lie is mentioned or not; and I am not aware of any recognized principle of law which requires such particularity: if there is, then I must say as I did before that I think the court must intend the lands to lie in the Midland District, where the *venue* is laid.

When the plaintiff enters final judgment, it should be entered to levy the whole amount of debt and costs of the goods and chattels of the intestate, but not to levy any part of the defendant's own goods, because her pleas are in fact true, although the new matter disclosed in the plaintiff's replication to the third plea establishes the plaintiff's right to judgment; the judgment should be to levy the amount of debt and costs of the goods and chattels of the intestate; the lands and tenements are *quasi* goods and chattels under the writ of *fi. fa.*, and consequently the judgment will sustain the writ against them as well as against the goods. It is true the process of execution goes against the lands *eo nomine*, but at the same time it must be admitted that the writ issues for the sole purpose of making the lands subservient to the provisions of the 5 Geo. II., which effectuates a momentary identity of lands and goods for the advancement of justice and support of an important civil right. If the 5 Geo. II. makes lands assume the nature of goods to satisfy debts, then the phraseology of the writ of execution issued against them cannot modify the effect of the enactment, and the lands must retain the same qualities throughout the whole proceedings, from the commencement of the suit till payment of the entire debt and costs be ultimately produced.

I am not aware of any rule of law which would invalidate the sale of lands under an execution against the goods. The statute 43 Geo. III., ch. 1. prohibits the including of lands in the same writ with goods, but I think the only reason for that enactment was, to allow a longer time for the sale of lands than of goods. That reason and no other is given by the legislature in the act itself, and if the lands are not in fact sold till the expiration of twelve months after the delivery of

the writ of *feri facias* to the sheriff, and after the return of a similar writ against the goods, I incline to think the omission of the words "lands and tenements," and the insertion of the words "goods and chattels" in the writ would not render the sale a nullity; I think it would be an irregularity but not a defect. It is true such a writ could be set aside at any time before its complete execution, and therefore it is not probable such a writ will ever issue, but the principle for which I contend can be explained as fully by a proposition hypothetically stated as if the case had actually occurred: it is simply this, that a judgment against the executor or administrator in the ordinary form will support a *feri facias* against the lands of the testator or intestate, because the real estate under such process is liable under the 5 Geo. II. to be sold like goods and chattels and for the same purpose. Under such circumstances, I see no necessity for changing the usual form of judgment against the personal representative, as it appears to me it would be a distinction without a difference. With respect to the writ of *feri facias*, it has always been the practice to mention the lands in it when it was intended to sell them, and I think the practice arose *ex abundanti cautela*, to prevent mistakes on the part of the sheriff by selling lands when there were sufficient goods, and when the parties themselves were not desirous of such a proceeding. For this reason the practice should still continue, but this reason does not apply to the judgment.

There are some other considerations against altering the form of judgment heretofore in use, which weigh strongly with me; many valuable estates have been sold and transferred under that form in many parts of the province, and an alteration would shake the titles of *bona fide* purchasers, or at least it would render them doubtful, and greatly obstruct the sale of the lands by the present owners, and thereby diminish their real value. The idea would naturally be suggested, that if there was a legal necessity for an alteration of the judgment, it must originate in some essential defect in the present form extending to all subsequent proceedings, among which are the sale and conveyance of the property. *Interest republicæ res judicatus non rescindi* is a maxim well known, and appears to me peculiarly applicable to a case like the present. The court should hesitate before they alter the form of the judg-



ment, when such alteration would endanger many titles heretofore given.

I think the plaintiff is entitled to judgment on the whole record.

MACAULAY, J.—A consideration of this case has induced me to relinquish the opinion I at first entertained, and to adopt the construction of 5 Geo. II., ch. 7, advocated by the defendant's counsel. My researches have satisfied me, however, that in many of the British plantations, the statute was understood to have placed real estate upon the footing of personal estate *quoad* creditors, but owing to local regulations it is difficult to find out the course of proceeding adopted under that act exclusively to sell such assets through executors or administrators. Of this however I am persuaded, that whenever so pursued, they were dealt with in all judicial proceedings as assets in hand or as personal assets, though perhaps only subject to sale by judicial authority: and it is because I cannot find in the statute anything to justify me in holding, that its operation has been to effect a change in the legal nature or quality of these assets as respects creditors, that it has subverted their ordinary character of real assets or assets by descent, and reduced them to personal assets or assets in hand, even to the qualified extent of rendering them such only on judicial authority, that I have felt constrained to take what I confess seems to be not the ordinary, and not the most expedient view as far as the interest of creditors are concerned. I am rather happy therefore, my learned brethren hold different sentiments, and shall be quite as well pleased if their opinion becomes the permanently established rule.

The principal question in this case arises out of the construction of 5 Geo. II., ch. 7, and involves the inquiry, in what manner and by what course of proceeding lands are made assets for the satisfaction of all just debts, and subjected to absolute sale for the satisfaction thereof, whether through the heirs, devisees and terra-tenants, or through the executors or administrators of deceased debtors.

The following, amongst other rules laid down for the construction of statutes, may be mentioned in the first place.—See Bac. Ab. Stat., and Com. Dig., Parliament.

1st. The title and preamble are to be regarded. 574 B

2ndly. And four things are to be especially understood and considered. (1), What the common law was before and when the act was made? (2) The defect or mischief not provided for by the subsisting law. (3) The remedy provided by the statute to redress such mischief. (4) The true reason and effect of the remedy.—5 Rep. 7; 1 Inst. 272; 2 Inst. 301; 1 Wil. 252; 3 Co. 12.

3rdly. A statute should be construed as near the rule and reason of the common law as may be, and an obscure statute should be construed according to the rules of the common law.

4thly. The intention of the makers should be regarded; and

5thly. A remedial act should be liberally and equitably construed.

6thly. *Words* which have a *well known* meaning at common law shall be taken in such sense.—2 M. & S. 230; 6 Mod. 145.

7thly. One part is to be construed by another, and if possible so that no clause, sentence or word be superfluous, void or insignificant.

8thly. Divers statutes relating to the same thing are to be taken and construed together.

9thly. Usage is a just rule in doubtful cases, but usage contrary to the meaning of the words shall not prevail.

10thly. The consequences are likewise to be contemplated when of doubtful import.

The law of England, previous to and at the time 5 Geo. II. was passed (1732) may be thus briefly stated: it is the law which in the absence of 5 Geo. II. would now subsist here, and shews the extent to which real estate would have been liable, had not a power of sale been imparted by that act. *In the king's case.* 1st. The king's debt of *record* bound lands at common law from the recording thereof, the lands being liable to satisfy the same,—Gilb. on Ex. 8, 2ndly. Specialty debts due to the crown bound lands by virtue of 33 Hen. VIII., ch. 39, sec. 50, which act placed such debts upon the footing of statutes staple under earlier acts hereafter mentioned. 3rdly. Simple contract debts due the king by certain public accountants bound their lands from the time such debts accrued, by 13 El., ch. 4, sec. 2, explained by 27 El., ch 3. 4thly. No other simple contract debts operated as a lien until *recorded*.—Whitm. 34. 5thly. The king's remedy

was by *levari fa.* to levy the profits, or by *extent*, supposed to have come into use in the king's case after 33 Hen. VIII., ch. 39, which referred to the statutes *mercht. and staple*, under which an extent was imparted to the subject.—Gilb. on Ex. 31; West on Extents, 2 San. 70; Hughes on Extents, Tidd's Practice, 1018, although now commonly regarded as emphatically a crown process. 6thly. The king could not sell the lands till 27 El., ch. 3, and the course of proceeding under that act being troublesome, the remedy was little used, till 25 Geo. III., ch. 35, afforded greater facilities, subsequently to 5 Geo. II. ch. 7.—Plow. 441; 1 Touch. 302; 2 Touch. 471-2. 7thly. *Goods* were liable to *sale* in the king's courts though only subject to seizure in inferior jurisdictions.—Gilb. on Ex. 1; they were bound from the teste of the execution, which in the king's case was by *habere, levari, fi. fa.*, and afterwards by extent and *vend exponas*; 8th Magna Charta, 9 Hen. III., ch. 8, required the goods to be exhausted before the king resorted to the lands. 9thly. After the death of a king's debtor, the lands (being bound) could be proceeded against by *sci. fa.* against the heir as explained by 27 El., ch. 3, and the *parol* might demur by the express authority of the act. *In the subject's case.* 1st. At common law a judgment did not bind lands, the real estate not being liable. 2ndly. The statute Westminster 2nd, 13 Sel. 1, stat. 1, ch. 18, rendered a moiety liable to be extended, from which period a moiety had been held bound by the judgment. 3rdly. Lands were bound, and the whole subject to be extended by the statutes *staple and merchant*; but 11 Ed. I., ch. —; 13 Ed. I., stat. 3, ch. 1; 27 Sel. 3, stat. 2, ch. 9; 23 Hen. VIII., ch. 6. 4thly. *Trust estates* were rendered liable by 29 Car. II., ch. 3, though bound from the time of execution only.—Com. Rep. 226. They are also declared assets by descent, and the heir *liable to* and *chargeable* with the obligation of his ancestor, *in like manner* as if the estate in law had descended in possession. 5thly. The remedy against lands was by *elegit* or *levari fa. ias*, under which the lands liable were extended and delivered to the creditor, but they could not be sold unless by decree in equity under peculiar circumstances.—2 Inst. 394; 3 Co. 12; 1 Bro. C. C. 312, 138, 155; 1 P. W. 151; Tidd's Pro. 1073; 2 Atk.

610; Amb. 17; Hob. 195-6; 2 Sar. 7, (5); 2 Inst. 394; 3 Bl. Com, 418.—See stat. 47 Geo. III., ch. 74, as to traders. 6thly. Goods were originally bound from the *teste* of the execution, from which time they were held to be *charged*, till 29 Car. II., ch. 3, limited the operation to the period of delivery to the sheriff, &c.; and they were subject to absolute sale, including terms for years, &c.—8 Co. 171; Tidd (a) 1078, 1099, 8th edition. 7thly. Lands as far as liable were bound by the judgment, as between the parties, from the first day of the term in or of which entered, and as respects *bona fide* purchasers from the time of entry and docket—29 Car. II., ch. 3, and 3 & 4 W. & M. ch. 20. 8thly. Lands were not liable to the satisfaction of simple contract debts after the death of the debtor, or other debts, except 9thly and 10thly. 9thly. A moiety where judgment was obtained against the debtor in his lifetime, when, (upon a return of *nihil* as to goods it is said Carthew, 107; 2 Sand. 72, o, p; Tidd. 1173, 8th edition;) the heir *quasi* terre-tenant though discharged as heir, and the terre-tenants might by *sci. fa.* be cited, and recovery thereon be had to extend a moiety of the lands of which the debtor was seized at the entry and docket of the judgment or afterwards—3 Bul. 319; Tidd. 1173-4. And the heir must be proceeded against before the terre-tenants, and shall not have contribution against the terre-tenants as they may against him.—Tidd. 1174. 10thly. And when the heir was named in and bound by the bond or other specialty contract of his ancestor, when (if not merged in judgment during the lifetime of the obligor—3 Bul. 319, and various cases,) all the lands descended were (if not alienated before suit—3 & 4 W. & M., ch. 14,) liable to be extended, the heir being sued on the *debit* and *detinet*.—Gilb. on Ex. 31; Toll. Ex. 149. The creditor recovered possession of the lands by *levari* or *elegit*, but could not sell the same unless as aforesaid. By section 4, lands devised for the payment of debts, or for portions to children upon agreements before marriage, were excepted in this statute.—1 Bro. C. C. 312; Willes, 521; 2 Ves. 577; 5 Ves. 449; 7 Ves. 323; 12 Ves. 154; 2 Atk. 125; Tidd. 1173; 2 Bro.

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(a) All references to Tidd's Practice are to 8th edition.



C. C. 614 ; Carth. 93 ; Comb. 162 ; W. Jon. 87 ; 3 & 4 W. & M. c. 14.

The heir was liable on a two-fold principle—as bound by the deed, and as having assets by descent. He was sued in the *debet* and *detinet*, but by showing a want of assets could relieve himself from liability. If he shewed the assets, the recovery was against them specially. If he made no defence, or pleaded a false plea, judgment was against him personally; or the plaintiff might elect to suggest assets specially and take judgment exclusively against them, for when the judgment was general against the heir personally, a *moiety* of all his lands at the time of judgment only could be extended ; but if taken against the assets by name, the *whole of the lands descended*, and in his seizin at the inception of the suit could be seized ; and if he had no lands except by descent, or had alienated any of them *pendente lite*, there would be an obvious advantage in resorting to the assets in preference to his own estate.—3 Atk. 327, 630 ; 3 Sal. 83 ; 8 Ves. 28.

Originally the heir was not only liable to the extent of lands descended and remaining in his hands at the commencement of the suit, from the beginning of which they were held *charged* ; the debt formed no previous lien, but 3 & 4 W. & M. c. 14, made him responsible personally for the value of all alienations, though the land itself could not be followed in the hands of *bona fide* holders.

After the stat. 32 Hen. VIII., a debtor might will his land, in which event the creditor was without remedy, till the 3 & 4 W. & M. c. 14, subjected lands to specialty debts (but debts only, not covenants, &c.) in the hands of devisees, 7 Ea. 127 ; and in the event of alienation, afforded a remedy against the devisee, by rendering them *liable and chargeable in the same manner* as if descending to the heir.—Ib. 133. The devisee however, to be sued jointly with the heir (if there were an heir), the devise *quoad* creditors being declared void, and the assets by descent being intended still to form the primary fund. And although the parol might demur in the case of an infant heir, an infant devisee could not claim the privilege, though sued in the *debet* and *detinet* also.—4 Ea. 484.

It may be further observed, as to an extent, that lands

may be extended on an *elegit*, or upon an extent at the suit of the crown, and delivered over or sold ; also that the lands may be extended and delivered in satisfaction, at an appraisal, to the creditor as was practised in some of the West India Islands.—Howard's Acts, *passim*; Toller, 256 ; 7 ves. 166 ; 8 Ves. 209 ; 1 Mad. ch. 286, 287.

Various jurisdictions, some enlarged and others limited, possess the power of granting probate of wills, or letters of administration, in cases of intestacy. Whatever the rule might have been formerly, the general rule of late, though not without exceptions, is, that notwithstanding bequests, specific or general, the executor, and equally the administrator, has the power of taking possession of and selling the legal personal assets. Creditors can sell them upon judgments against the executor or administrator, but possess no lien, so much so that they might be sold *pendente lite*, *bona fide* ; the executor or administrator, however, being always personally responsible to the extent of such assets as came to his hands. The assent of the executor or administrator will generally vest *specific legacies*, and (as observed) *bona fide* sales by them are binding and valid. The creditor can only obtain satisfaction by selling the assets remaining in hand, or by suggesting a *devastavit*, &c., if wasted, or adopting such other course as the peculiarities of the case might require. The rules as to ordinary personal estates are well defined, whether in relation to the jurisdiction empowered to grant administration, the remedy and course of proceeding to sell the assets, or to render the executor or administrator liable, the authority and duration of probates, or letters of administration, to executors or administrators originally or *de bonis non*, or executors of executors, &c. And various distinctions prevail when the assets vary in their technical qualities, as legal or equitable, as *bona notabilia*, or funds accruing from lands, or out of the ordinary form. These rules and principles it would be tedious to recite, but they should be examined previous to the consideration of the present question.

Having thus briefly adverted to some of the rules and principles pervading the law of England respecting personal and real estates, and their respective liabilities to creditors, whether in the life-time of the debtor or as assets after his

death, I would again remark that the 5 Geo. II. must be construed as incorporated with it, and with a view to this system as a whole, giving to the different parts of it, and the technical terms used in it, such meaning and interpretation as can be derived from or be understood by an examination of that system. We can reason and adjudicate by no other lights and aids than the law of England—our legal ideas and principles of action must be drawn from that fountain.

In the plantations, the English law mainly prevailed, though in some the rule of primogenitureship had been abolished.—See the General Law of Penns. 1682; Hubbard's Hist. of New England, 592; so that the 5 Geo. II. c. 7, may be considered to have been originally engrafted upon the English law of real property. It is conceived the right of a creditor to extend lands upon an *elegit*, or to proceed against the heir upon his ancestor's bond as in England, was never denied in any of the colonies.—3 Mod. 159; 3 Keb. 785; 2 Lev. 201; 4 Mod. 226; 2 Sal. 666; Holt, 495; 2 Lord Ray. 1274; 2 Vent. 358; 1 Vern. 90, 453, 460, 469; 2 Ch. C. 145; 1 Lutw. 623; 3 Ves. Jr. 115.

Formerly land in the plantations had been treated very much as personal estate, especially as respected creditors and their power to sell them; and ultimately the local legislatures of many of them expressly subjected them to absolute sale in execution. Other colonies refused to adopt this regulation, and their reluctance induced the passing of 5 Geo. II. c. 7. This act does not appear to have been well received, but eventually the plantations either submitted to its operation, or evaded its obnoxious interposition by local provisions of similar import.

The statute may be supposed to have extended to Canada before the division of the province.—See the Proclamation of 1763, 14 Geo. III. c. 83, s. 8 & 18; Ordin. 25 Geo. III. c. 2, s. 30, 31, 33. It was recognized by our provincial act 43 Geo. III. c. 1. At all events it has been decided, in the last resort, to have force of law, and at latest must have come into operation contemporaneously with the general law of England adopted by our legislature in 1792, under the authority of 31 Geo. III. c. 31. The latter act declares that lands shall be held in free and common socage, and the

circumstance of their being holden under such a tenure, effectually distinguishes them from personal estate, except so far as affected by 5 Geo. II. in favour of creditors, in whatever light plantation estates might formerly have been regarded in England or the colonies, The *remedy* designed by the 5 Geo II. has been adverted to, It seems universally conceded that lands are subjected to sale in satisfaction of all debts, and the only present difficulty is to determine in what manner and through whom.

I do not feel warranted in relying upon contemporaneous construction and usage, or upon the light in which plantation estates have been regarded of old, because the usage as to the course under 5 Geo. II.; exclusively for selling lands *as assets*, is not satisfactorily explained in anything I have seen, and because the footing upon which real estates are placed in this country destroys the personal character formerly attached to such property, and because enjoying the law of England under the same authority that gave being to 5 Geo. II., we must construe it with a view to and upon a consideration of the whole system, and by the rules and principles of the common law. In addition to which, the construction in this province, and in this court, and (consequently) the usage here, have not been uniform. And under all the circumstances, I feel constrained to place my own construction upon the statute, in doing which I have the consolation to think that the legislature can administer a prompt and effectual remedy in favor of *bona fide* purchasers under questionable proceedings. And that as it is most probable my view is incorrect, so the opinions of my learned brethren, though I should eventually be found right, will in the mean time prevent any inconvenience to those whose interests are involved in this question, and which ought to be as far as possible protected.

I shall then, in the first place, endeavour to distribute the act. It seems to me to provide, that the houses, lands and other hereditaments and real estate (I omit negroes, the act as respects them having been repealed, and no such property being possessed within this province,) belonging to any person indebted to his Majesty or any of his subjects, shall—

1. Be liable to and chargeable with all just debts, dues and demands, &c.



2. Be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond, &c.

3. Be subject to the like remedies, proceedings and process, in any courts of law or equity, for seizing, selling, extending or disposing thereof towards the satisfaction of all just debts, duties and demands, &c., and in like manner as personal estates are seized, sold, extended or disposed of for the satisfaction of debts.

There is a want of strict grammatical connection in the last clause, which adds to the perplexity it has occasioned. The act contains three independent provisions. 1st. It renders lands liable to, and chargeable with *all* debts 2nd. Assets for the satisfaction thereof, as formerly liable to bond debts. 3rd. Saleable by the like remedy and in like manner as personal estate. In the life-time of a debtor, the first and third clauses prevail—viz., lands are liable to and chargeable with all debts and rendered subject to the like remedies, &c., for seizing and selling them, &c., and in like manner as goods. The judgment against a party living being general, without specifying assets, no doubt a difficulty has arisen in such cases, because the execution issues against whatever effects are liable, as being founded upon the general judgment recorded, specifying however lands or goods according to the fund intended to be attached; but it is obvious that if the third clause has any effect upon the legal character of the lands, &c., as assets; it must have a similar operation thereupon in the life of the debtor upon ordinary proceedings. After the death of a person indebted, the second and third clauses apply. Lands are assets in like manner as liable to bond debts in England, and subject to the like remedies, &c., for selling them, and in like manner as chattels. There is room to contend, that as assets, lands are not subjected to sale at all by the 3rd clause, the main object of which clearly was, to subject lands to sale upon ordinary judgments in the life of the debtor, and it is not probable particular attention (if any) was bestowed upon the mode of their disposal as assets; but it has never been questioned, and I infer that in either event lands are made liable to absolute sale. Still it is apparent, that the whole object of the third clause is to *enlarge* the remedy from *extent*

upon *elegit* to *absolute sale*. It is not that clause that renders lands liable to and chargeable with debts, or assets for the satisfaction thereof, but which subjects them to *sale* by *extending* to them the like *remedy* &c., and in like manner as against personal property.—Notes, 54.

Bearing these observations in mind, the second clause makes lands *assets*. If we stop at the word *assets*, and refer to dictionaries for its meaning, we find it explained, and possessing a well-known character. Assets are described as of four kinds :—

1st. Legal; 2nd. Equitable; 3rd. Assets by descent, or real assets; or 4th. Assets in hand, or personal assets. By assets are meant the property of a deceased debtor, applicable to the discharge of his debts and legacies : they are essentially devisable into land and moveables, or real and personal, in relation to the nature of the property ; and into the more technical one, of the legal and equitable, with respect to the courts and systems of jurisprudence by which they are administered. Whether saleable or not through the execution, would seem to depend upon the question, whether lands form assets in hand or by descent? i. e.—personal or real assets, *quoad credi'tors* ; in other words, whether 5 Geo. II. c. 7, by subjecting them to sale, has imparted to them the legal character of personal, and destroyed their original nature of real assets, or assets by descent.—6 Mod. 143 ; 2 M. & S. 230 ; 1 Cruise, 183, 257 ; 1 P. W. 151, 509 ; 8 Co. 96 ; Co. Lit. 42 (a) ; 6 Cruise, 456 ; 4 Mad. R. 46 ; 3 Mer. 410 ; Hard. 405 ; 9 B. & C. 480 ; 4 Man. & Ryl. 386 ; 1 B. & C. 364. Now assets having a known legal signification, must be so understood in this court, and in the eye of the English law they must form real or personal, legal or equitable assets. Lands under 5 Geo. II. are not assets in like manner as lands devised to be sold for payment of debts, because such lands would seem to form equitable assets exclusively, tangible only in equity ; nor as estates *pour autre vie*, which uniformly constitute *real assets* out and out, or *personal assets* out and out.—Carth. 166. And lands, by 5 Geo. II., may be proceeded against in a court of law as well as in equity. I think they form *legal assets*, in like manner as lands in England do, in favour of specialty creditors.—1 Vern. 63 ; 2 Atk. 50. The

act itself speaks of lands as real estate, and of subjecting them to sale in like manner as personal estate, but does not say they shall be personal estate. It seems rather to preserve the distinction throughout, further marked by our whole course of local legislation. If lands are assets by descent, or real assets, especially if in like manner as liable to bond debts in England, they must be liable in the hands of the heir, devisee or terre-tenants. If tangible through the executor, they must be *quasi* personal estate *quoad* creditors; and if made so, it must be by the 3rd clause of the 4th section, which in *terms* merely points out the *remedy*. The provision or remedy is coercive, but a coercive remedy implies a power to act requiring such coercion. And if the executors or administrators could not themselves sell, and it has not been contended they could, why should a coercive remedy subsist against them, when there is another party who could sell? The lands being rendered assets in favour of all creditors, a remedy against the heir, not as heir, but as the terre-tenant, or against the terre-tenant, whoever he might be, would, if the act did not expressly grant it, result as a legal consequence; and as implication must be resorted to on either hand, it seems as reasonable to imply that suits in simple contract were intended against the terre-tenant, as to imply a desire to render lands saleable through the personal representatives; to imply that the statute creates or transfers a privity of contract in respect of the estate (as held with respect to the statute 32 Hen. VIII. ch. 34, concerning grantees of reversions taking advantage of conditions to be performed by lessees), as that it creates or transfers a privity of estate in respect of the contract.—1 Saund. 273-6; Cruise's Dig. Tit. Assignee; Ba. Ab. C. E.; Com. Dig. C. A. The cases upon this statute of 32 Hen. VIII., &c., of the liabilities of assignees at common law, upon covenants, &c., running with the lands deserve peculiar attention, especially as respects the local or transitory nature of the remedy or action.—Evan's note to this stat. 2 East 579, 580; 2 Inst. 55, 74; W. Co. 75; 6 Mod. 27; 3 Co. 12; 3 Bul. 319; Haph. 154; 1 Jo. 88; 2 Sal. 415; 4 Bear. 2381; Cow. 291. The statute does not name or point out the executor or administrator as the party, and the usual party to be resorted

given was sufficient to entitle the lessor of the plaintiff to recover. He came in as a purchaser at a sheriff's sale, having no privity with the former owner by any previous contract. The property was clearly leasehold; the King's letters patent designating it as a clergy reserve, and granting a term in it of twenty-one years to one Collins, are matters of record. By what assignments it might have become vested in William Dennis, who was in possession of it ostensibly as his own, cannot be supposed to have been within the knowledge of the purchaser at sheriff's sale. As against him, the law raised *prima facie* the presumption that it was his, and upon this presumption, not rebutted, the lessor of the plaintiff could have recovered if the proceeding had continued to be carried on as against him. But it was not continued against him as defendant, because the present defendant John Dennis, claiming expressly for himself an interest in the premises, and asserting that he was landlord, had upon that claim and assertion been admitted to defend instead of the debtor the tenant in possession. We are of opinion, that this intervention and claim of John Dennis authorized the lessor of the plaintiff to look to him as the person most naturally and probably in possession of the original lease from the crown, and of any intermediate assignments by which the term might have been conveyed, and that they rendered it unnecessary for him to look to any other quarter for them. If he had them not, it was impossible to conjecture where they were likely to be; and in applying to him to produce the documents, the lessor of the plaintiff gave credit to his own declarations, which it cannot lie in his mouth to repudiate; for besides his assertion of title as landlord, in consideration of which he was received to defend, it was proved that he attended at the sheriff's sale, and expressly warned people not to purchase, affirming that he was owner of the lease, and had bought it of William Dennis. Under these circumstances, he cannot reasonably require the lessor of the plaintiff to shew that he has searched about the world for documents, about which he could be expected to have no previous knowledge, but which, if the defendant himself spoke truth, and was not a mere officious intermeddler in this action, must upon plain principles be



supposed to be in possession of him the defendant. The notice to produce the lease and all assignments of it was therefore, in our opinion, properly served upon the present defendant. It was unavoidable expressed in comprehensive and general terms, for the lessor of the plaintiff, for all that appears, was ignorant of particulars, but it clearly conveyed information of what was desired, and complied sufficiently with the established practice. The defendant having received this notice, does not choose to disclose at all upon what pretence he advanced a claim to be a party to this record. He forbears giving any evidence of title, and carefully abstains from entering upon any comparison of right with the lessor of the plaintiff, throwing upon him all the difficulty of proving an unknown chain of title, which would have formed no part of his case if the defendant had not intervened, and by a claim of right interposed between him and the tenant in possession. Under such circumstances, the lessor of the plaintiff could only give the best evidence in his power. After the notice which he gave to produce papers, we think he was properly let in to give secondary evidence, and we think the secondary evidence which he did give was such as warranted the verdict. Gannon swore that he purchased the lease from Collins, and took an assignment by indorsement on the King's lease. Parol evidence was sufficient when no reason existed for supposing that the lessor of the plaintiff ever had or could have had a copy, and it is only required by parties to make proof by subscribing witnesses, when it is shewn that there were subscribing witnesses, and that they are known and are living within the jurisdiction of the court. Mr. Washburn then proved that he had professional knowledge of Gannon having assigned to William Dennis; that he assigned by endorsement on the lease which was drawn in his office, and to which he believed he was a subscribing witness.

This evidence warranted the jury in considering that the term originally created in Collins was no longer vested in him, but in William Dennis, against whom the execution was; and moreover, if this evidence required to be strengthened, there was proof of the express declaration of John Dennis, the now defendant, that his interest was derived

from William Dennis, whose title he thus recognized—not to be sure conclusively so as to disable himself from disproving it, but *prima facie*, and in the absence of evidence to the contrary.

It is beside the case to enquire whether William Dennis's statements and admissions could be received to invalidate a title he had himself given, and whether William Dennis's continuing in possession after the alleged assignment to John Dennis, did not warrant the presumption that such assignment was fraudulent, because there was no proof whatever given to the jury that William Dennis ever did assign this lease to John or to any person. John by claiming to hold under him, may place himself in a situation that entitles the lessor of the plaintiff to deal with him as a person that by his own showing ought to have privity with the estate; but when it comes to be a question whether the title proved to be in William, and transferred to a third person, is to be defeated by a prior assignment by William to the defendant, such an assignment must be shewn by evidence, and can never be inferred from John Dennis' own declarations of his title. These may have some bearing for certain purposes of evidence as conclusions against himself, but clearly can lead to no conclusions in his favour. As therefore there was absolutely no evidence that William Dennis ever did assign to John Dennis, there is no foundation for applying the principle, that a person shall not be received to invalidate a title made by himself. The situation of grantor and grantee, for all that appears, had not been created between him and John Dennis, and his admissions, according to my view of this case, were not irrelevant or inadmissible. They were unnecessary to be sure, because nothing was shewn to controvert the title proved to be in William. They were not irrelevant, or inadmissible, I think, because it seems to me to be common sense, that when a person admitted to defend 'as landlord against a purchaser at sheriff's sale of an estate in the possession of a debtor, will give no evidence of title whatsoever, but contents himself with throwing difficulties in the purchaser's way, the purchaser should be left to make out his case as if he was contending with the debtor, the tenant in possession.

The maxim that the plaintiff in ejectment must succeed on the strength of his own title, is founded upon the principle of protection to the actual peaceable possessor—he shall not be disturbed until a man appears who has good right. But in such a case as this, the actual possessor was liable to be ejected, because the property having been presumed to be his, had been sold as his, and as against a person who was not in possession and who will shew no right, I do not see why the lessor of the plaintiff should not have the benefit of the same presumptions in his favour as if he had been left to contend with the actual tenant in possession. The cases in 4 M. & S. 348, and 2 T. R. 55, tend much to confirm me in this view of the case, which however I merely give as from myself.

The judgment of the court is upon the title shewn by the lessor of the plaintiff, independently of any declarations of William Dennis.

*Per Cur.*—New trial refused.

## IN THE EXECUTIVE COUNCIL.

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[*Before the Hon. the Chief Justice, the Hon. J. B. Macaulay, Ex. C., the Hon. H. J. Boulton, Ex. C., and the Hon. Mr. Justice McLean.*]

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FEBRUARY 13th AND 27th, 1847.

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### SIMPSON V. SMYTH.

The Court of Chancery, under the eleventh section of the Chancery Act, may under certain circumstances refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession

This cause having been again brought on for argument, *Mr. Blake* appeared as counsel for the appellants, and *Mr. Esten* for the respondents ; their arguments being confined to the construction to be placed upon the eleventh section of the Chancery Act, 7 Will. IV. ch. 2.

ROBINSON, C. J.—I retain in this case the opinion which I expressed after the last argument. I still have no doubt that the legislature did intend by the eleventh clause of the Chancery Act, to give to the court which they were about creating, an unlimited authority to grant or withhold redemption of a mortgage, as well as authority to impose particular conditions for the benefit of the mortgagee, in regard to compensation for improvements, when they should allow redemption ; this discretionary authority to depart from the rules of equity in England being limited, however, to those cases in which the estate of the mortgagee had become absolute before the passing of the act, by reason of the failure of the mortgagor to perform the conditions. I think also, that it is by no means unreasonable to suppose (but quite otherwise), that the legislature would think it proper after the most mature deliberation to grant this extensive discretion to the new court.

They were about suddenly to create an equitable jurisdiction in a country in which the law of England, uncontrolled by and unmixed with equity, had been administered for nearly fifty years ; and where mortgages had been freely



given and taken throughout all that period, both parties being left, in such cases, as in all others, to the legal consequences of their contracts. It might have been an opinion among lawyers, looking speculatively at the subject, that there was an equity of redemption nevertheless slumbering, though the mortgagor, as the law stood, had no means of enforcing it, and the mortgagee no means of guarding against it by foreclosing.

The legislature, when they were about creating a court of equity in 1837, if they desired that it should have the power of granting relief in respect to past transactions no longer open, and when nothing remained to be executed on either side, must have been sensible that by thus throwing a new ingredient into such contracts, they were creating a state of things very much out of the ordinary course.

They could not collectively foresee, nor, I think could the most experienced mind among them have foreseen, the questions and difficulties that might present themselves, if the proposed court of equity were to have power to deal with such cases as I have described, and were expected to apply to them the rules and principles of English Courts of Equity, without making allowance for such a state of things as does not exist in England ; but I think it might be expected to occur to the least experienced mind in the legislature, upon slight reflection, that the court would soon be urged to allow redemption, in cases when in England redemption would be out of the question on account of the lapse of time ; and that it would on the other hand be not unfrequently perhaps pressed to refuse redemption where in England it would undoubtedly be allowed, the respective parties resting their claims on the peculiar equitable considerations arising from the circumstance, that there had hitherto been no court of equity. The mortgagor might say, “ I come late it is true, but it is only because there was no such remedy to be had before.” The mortgagor might say, “ I claim to hold my estate absolutely, though I have not been twenty years in possession, because having no means for foreclosing, and having waited for years for my debt, relying on an unproductive security, I was obliged, as the mortgagor well knew, to avail myself of my legal rights, and to act

“as if I were in that situation, which I unquestionably would have been in, if I had had a court open in which I could have proceeded to foreclose.”

I need not hesitate to say, that there might well arise cases in which the mortgagee would have justice in his favour in objecting to redemption being granted, even though there had been no bar from mere lapse of time, and though there might be no other ground on which redemption could be refused under the authority of any adjudged case in England; for in the very case before us a majority of this court have expressed the opinion that it would be reasonable and just to refuse redemption, if the court had the power to do so. And I could easily suppose cases in which the grounds in favour of the mortgagee might be even stronger.

It might have occurred to the legislature, and possibly it did, that new cases in have very many instances given rise to new precedents; that it is the essential attribute of courts of equity never to be compelled to do injustice; and that whenever they find they cannot interpose without inflicting wrong, they will leave parties to abide by the consequences of their legal rights. And they may not have taken it for granted, that if they should make no special provision on the subject, the new court of equity would not have an inherent discretion and authority to depart from English rules in such cases, whenever they should see clearly that their application must produce injustice, on account of past circumstances, and a state of things peculiar to this country, and which could not have received consideration in English courts of equity. If, in truth, they had entertained that impression, either certainly, or with some degree of doubt; yet they could not be sure that the judge who should preside in the court would feel his ground clear in that respect, and they might be well satisfied, that if he should assume a discretion to create new principles of action in his court, his right to do so would be strenuously contested. They might therefore naturally feel, that it would be more considerate towards the proposed new court, and to those who were to be litigants in it, if they should make it clear in their statute, that they intended to invest the equitable tribunal with full power to do complete justice in the cases alluded to, unfettered by the

English practice, established as that had been under widely different circumstances.

It might be objected by some, that this would be conferring a dangerous power and authority to act without settled principles; but others might think that evil less, with the security of a double appeal, than the evil of leaving the court under the certain necessity of doing injustice, from the want of power to do what they might see and know to be right; from an inability, in short, to meet an unusual exigency.

All that we need know is, that the legislature *did* resolve to express in the statute the manner in which they expected and intended the new court to act, in this particular department of its jurisdiction; and to this end they framed the clause now in question.

They recite in it, that the absence, up to that time, of any court capable of decreeing a foreclosure, might, in regard to part transactions, have given rise to circumstances affording ground for peculiar equitable considerations; and which would, under the rigid application of English rules, be productive of injustice to one party or the other.

Now, as the legislature thus plainly admitted, what any one conversant with the subject could not fail to see, that there might be equitable reasons for departing on either side from the English practice in the matter of mortgages, it would have been a very one-sided equity on their part, if they had, after all, resolved to leave the court at liberty to do complete justice to one of the parties, according to whatever might be its sense of justice, and yet to confine it within such limits in regard to the other party, as might disable it from doing justice to him according to the same full measure.

It is plain, I think, that the legislature ought to have had no such intention; that if they resolved on the one side to give to the mortgagor the privilege of going after the twenty years and asking for redemption; they should on the other side, under the influence of the same sense of justice, hold him subject to the equity of having redemption withheld from him, though he might sue for it within the period generally allowed for it in England, provided the facts

which had occurred during the time when no court of equity was open, should lead to that as the most just result. If they had allowed a clear equity, created by our past peculiar state of the law, to operate in favour of the mortgagor, by enlarging his right of redemption, they would have acted unreasonably in not allowing as clear an equity to operate against him in abridging his right. In the latter case, it would not be putting the matter correctly, to say, (as was suggested in the argument) that they would thus by legislation be depriving the mortgagor of his estate; they would only be authorising the court, when they saw that to be just, to forbear *giving his estate back to him*, after he had lost it by his own wilful or negligent default, and when they should see plainly that by reason of some peculiar circumstances, it could not be restored without doing an injury to others far greater in amount than any benefit which he was fairly entitled to claim.

I do not feel the slightest doubt, that the legislature did intend thus to make the chancellor the equal distributor of justice between both parties.

Then, have they failed (as it is argued they have,) in giving effect to this just intention? To determine the point we have to examine the eleventh clause, and indeed the whole act, if there be any other part of it which can help us to see what was intended. And after all that has been said, when I look again at the recital by which the enactment in the eleventh clause is prefaced, and at the enactment itself, I must say that I feel the full force of the maxim referred to by the court, in Jeffrey's case, 5 Co. 67, "*perspicue vera non sunt probanda*;" and I feel also the force of the commentary upon that maxim, because (as the court say) "he who endeavours to prove them, *obscuras them*."

It is, however, I must admit, a common case, that where we feel ourselves no degree of doubt upon any point that has been started, we can hardly prevail upon ourselves to examine with due attention the reasonings by which our conclusions may be opposed. I would very much desire to avoid any such impatience in the present case, because the question that is raised is really an important one, and may apply in some shape in a great number of cases. Still I



must confess myself unable to reason clearly upon the grounds of doubt, because I really have failed to apprehend them, and to discover in what part of the clause a question can find entrance.

It was ingeniously endeavoured, on the last argument, to raise doubts upon the construction, by dividing the clause into two branches, as it were, and showing how its language could or could not be made to support separately two modes of application, one applying directly to the mortgagee only, and the other to the mortgagor. This method may be effectual in this case, as in many others, for creating a difficulty; but if, when we read the whole clause together, any apparent difficulty is removed, then the ingenuity of raising a doubt by reading it separately, must appear to have been exerted in vain. For effecting some useful purpose, a material substance may be required to be framed in a certain shape, and if when that is done, the desired result is obtained, it is no argument against the efficiency of the instrument, that it cannot be separated into two parts, each of which shall be capable of standing alone and of accomplishing one half of what is expected from the whole. It is sufficient if when taken and used together it answers the intended purpose. When we see a mill, for instance, complete in all its parts, we have no doubt what purpose it is intended to accomplish and is capable of accomplishing as a whole; and we could not allow ourselves to be in doubt on either point, because it might be demonstrated to us that it could not be so divided into two parts, as that each should be capable of doing the work or part of the work of the whole. So it is of the effect to be derived from written language; whether it be a will, a deed, or an act of parliament we have to construe, our obvious course is, to take it as it stands, and looking at it as a whole, to satisfy ourselves of its meaning; and when we have discovered this, we are bound to give to it its due effect.

Now, when the legislature has thought fit to declare in express words, that “the vice-chancellor shall have power “and authority in all cases of mortgage, when before the “passing of this act the estate has become absolute in law “by failure in performing the condition, to make such order

“and decree *in respect to foreclosure or redemption*, and with regard to compensation for improvements, as may appear to him just and reasonable;” they seem to me, by those words alone, to relieve the court from any necessity of doing injustice to the one party or the other, by a servile adherence to English decisions made under different circumstances; but still more when they have not stopped there, but have proceeded to give authority to the court “to make such order and decree generally with respect to the *rights* and *claims* of the mortgagor and mortgagee, and their respective heirs, &c., as may appear just and reasonable under all the circumstances of the case,’ I cannot understand how a doubt can be entertained that the court has a perfect control over the whole subject, and may deal with the right of redemption in all such cases as they may think just.

It has been urged, that when the legislature in the preamble speak of the “*right to redeem*,” they admit it to be a right, and that it is inconsistent with such admission to suppose that they intended that the court might refuse to allow that, which they have acknowledged in terms *to be a right*; that they can therefore only be supposed to have meant, that although the right to redeem *must* be conceded here wherever it would be conceded in England; yet that the case may be treated otherwise than according to English practice, *so far as regards compensation for improvements*; but I think such a construction is founded on this error, that it takes the allusion to “the right to redeem” as connected with each particular case that may be pending here in our court, and as involving an admission *a priori* of the right to redeem in such particular case; whereas I take the reasonable understanding of the words to be, that the legislature was merely then alluding to the “right to redeem” as a general principle of equity known to that system of equity which they were about to introduce, and which “right to redeem,” speaking of it merely as an abstract right in cases of mortgage under the law of England, might, as the legislature declares, upon a strict application of the rules established in England, be attended with injustice, if enforced in all cases within twenty years; on which account they resolved, that

in this country (so far only as respects mortgages under which the estate had become absolute before the court was created) the *right to redeem* on the one hand, and the compensation to be granted for improvements on the other, in case redemption should be allowed, should be left to depend upon the circumstances of each case, and might be granted or withheld as the court should think just and reasonable. I can put no other construction on the clause; the enacting part of it is certainly so plain and comprehensive, that if it stood alone it would not be possible to raise a doubt upon it; and as to the preamble, the legislature having naturally referred to the circumstance, that up to that time mortgagees had had no means of foreclosing, as affording ground for equitable considerations in their favour, to be urged against what otherwise might have been advanced as a plain right of the mortgagor, admit, that "in consequence of the want of these remedies the *rights* of the parties may be found to be attended with peculiar equitable considerations, as well in regard to compensation for improvements, as in respect to the right to redeem." Now, if to the last word "redeem" the words "*at all*" had been added, there could seem to be no escape from the conclusion that they meant the court to have a control over *the right to redeem*, as well as over the conditions upon which redemption should be granted; and yet to my mind, the only real effect of concluding with those two words, would be to give an inelegant redundancy in a sentence, the meaning of which was as plain without them.

I do not see that the 43rd clause of the provincial statute 4 Will. IV., chap. 1, can interfere in the slightest degree with the question, what power is given to the Court of Chancery by the 11th clause of the subsequent statute.

The legislature, by the 4 Will. IV., were assigning a limitation to actions concerning the reality; and their attention being drawn, while following the late English acts, to the subject of mortgages, they even then perceived on this incidental view of the matter, that it would be necessary to recognize peculiar equities in this country as arising from the yet unsupplied want of an equity jurisdiction; and they took care not to do mischief by making twenty years necessarily a bar, until the mortgagor had had a reasonable chance

of compelling what a harsh creditor might have unreasonably refused to him. But the provision was purely negative; they forbore to shut the door.

The consequence, and only consequence, of what was then enacted, is that a mortgagor might come into the court which was afterwards established, and say that though his mortgage was given very long ago, yet that the 4 Will. IV. did not bar him simply from the lapse of twenty years, because the 43rd clause had considerably extended his time

To this the mortgagee might truly have answered, "I admit that the 4 Will. IV. does not bar you, and I freely admit also, that no other act bars you, merely because the twenty years have run; for the latter act, under which we are now before a competent tribunal, has authorised the Vice-Chancellor to allow you to redeem, if he finds it to be just that you should, or refuse it if he thinks it would be unjust, taking into his consideration the conduct of parties, the changes in the title or condition of the property, and all the facts of the case, without being bound by the mere circumstance of lapse of time to decide one way or the other," and this I consider to be the evident intention and effect of the eleventh clause of the Chancery Act.

Something was said upon the last argument regarding the order which the court had pronounced, after the first argument, with respect to the costs of the appeal from the several orders of the Vice-Chancellor, made upon the demurrer for want of parties, and upon the plea which set up the sale of the equity of redemption under the judgment against Smyth, as a bar to the plaintiff's right to redeem. I think the question of costs must be disposed of as we then intimated it would be.

His Honour the Vice-Chancellor was of opinion, that the plea was no defence. We concur in that opinion, and therefore affirm his order with costs, to be paid by the party appealing against it. This is the usual course. With respect to the order of his Honour over-ruling the demurrer for want of parties, we have not made up our minds to the conclusion which his Honour came to; but the contrary, and are not prepared to affirm his judgment in that respect. We should not have dismissed the appeal except for the



reason, that the defendants had waived it by submitting and putting in their answer. Dismissing it on that ground only, it would be contrary to the practice of the court to give costs; because the respondents should have urged that objection by way of petition against the appeal, and should not have gone to the argument upon it. We acted on the English rule in this respect, in the case of *Crooks v. Rhodes*.

MACAULAY, Hon. J. B., Ex. C.—So far as respects the application to this case of the rules of decision which govern the Court of Chancery in England, according to the provincial statute 7 Will. IV., chap. 2, sec. 6, my former impressions remain unaltered. I still think it properly depends upon the eleventh section of that act.

After the last argument, I had prepared some further remarks, not evincing any change of opinion touching the construction of this clause, and confining attention to the Statute of Limitations, 4 Will. IV., chap. 1, sections 16, 19, 35, 36, and 43; and the Chancery Act, 7 Will. IV., chap. 2, especially the 6th and 11th sections, including the proviso to the 43rd section of the former and the preamble to the 11th section of the latter, and construing all together, guided by the rules laid down for the judicial interpretation of acts of parliament (*a*).

I could not place upon the language used, any other construction that I felt it my duty formerly to avow. But in reference to what I then said respecting my answers to a series of questions put to me by a committee of the Legislative Council, when the Chancery Act was pending, I have to explain that although I formerly searched in my library for the printed journals of that house (of which I possess a number), I could not find those for the year 1837. I have a copy of the bill as sent up from the House of Assembly, in which the 11th section relates exclusively to compensation for improvements; but the questions of the Legislative Council were, by desire of the committee, returned with my answers, and I had not seen them since; nor had I ever seen the answers of the other judges, that I am aware of;

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(*a*) Dwaris on Statutes, 688. 760; Ba. Ab. Stat. I. : 1 Bl. Com. 59; 1 Steph; Com. 71; Moore's Legal Maxims, 253, 300.

neither had I bestowed any particular attention upon the eleventh section of the act as passed, till this appeal.

The other day I was induced to make a renewed search for the journals of 1837, in the hope of finding the questions and answers printed therein, and I am happy to say with success. Upon examining them at pages 186-7 of the journal, and in the appendix L., I found the amended clause, and the questions, together with the answers of the judges and crown officers, and it is now quite clear to me that, however expressed, it was undoubtedly the intention of the legislature, in substituting the present for the former section, to confer upon the court an unfettered discretion to grant or refuse redemption in all cases of mortgages become absolute at law before the passing of the act, viz., the 4th March, 1837.

After perusing the eleventh section, as it originally stood, together with the questions and replies, especially the eighth and ninth, and then turning to that section as amended, the intent of the substitution is, I think, apparent. The words "*right to redeem*" in the recital to the amendment, seem to be used not so much as meaning the acknowledged right of redemption as an interest of the mortgagor in the estate, as I had supposed ; but rather the propriety of such right being recognized, or of the mortgagor's being admitted to redeem at all in reference to the claims of the mortgagee to have redemption denied or refused. And the word "*right*" does not correspond in meaning with the word "*rights*" in the part of the preamble which speaks of the rights of the parties as compared with the right to redeem. Although it was formerly suggested that the term "*right to redeem*" meant "permission to redeem at all," I could not, nor can I now, reconcile such a meaning with the rest of the recital, the import of the word "*right*" or the seeming spirit of the clause on the face of it. I have been so much accustomed to associate with a right, the idea of something appertaining or belonging to a party as his right, rather than a questionable claim to be allowed or rejected at discretion, that I had always felt repelled from such a qualified construction in the present instance, or from regarding it as intending to impart a discretion to infringe upon the right to redeem, when such right would be acknowledged to subsist, according to

the rules of decision which govern the Court of Chancery in England. We read of the rights of persons, and the rights of things, (2 Bl. 158-9;) of legal and equitable rights (Toml. L. Dic. "*Right*;" ) of the rights of entry or of possession, and the right to redeem, (Coote on Mortgages, c. 4; Story Eq. Jur. ss. 1015, 1023; Powell on Mortgages, c. 10;) that redemption is not only a right, but more than a right. Lord Hale defines it to be an equitable right inherent in the land.—See also, 1 Atk. 602; and 5 Mad. 290.

Different meanings are, no doubt, attributable to the word "*right*" according to the context; and here it appeared to me to have been used in a technical sense, but I can now perceive it was meant to be understood as if it had said "that from the want of an equitable jurisdiction, it had not "been in the power of mortgagees to foreclose, and in consequence of the want of this remedy, their rights might be "found to be attended with peculiar equitable considerations, as well in regard to compensation for improvements "as in respect to the right or claim of mortgagors to be "suffered to redeem;" or as if it had said, "Not only in "regard to compensation for improvements, but in respect "to the propriety of granting or withholding redemption;" for the questions of the committee of the Legislative Council manifest a solicitude to favour or protect mortgagees, not mortgagors, and the amendment was seemingly introduced and adopted mainly with that view.

With respect to the division of the eleventh section, in my former opinion, it may be proper for me to observe, that I still think it not only a legitimate, but the best mode of getting clear views of its provisions and testing its meaning, for whenever it is to be applied it must be separated in the mind; and surely, however construed and applied in any particular case, it ought to be susceptible of a reading consistent with itself and conformable to such construction and application; and I must still confess that I cannot perceive that the preamble consistently and naturally admits of any other reading than I have given it.

It of course may yet remain a question, whether the eleventh section be capable of a construction in accordance with the intention of the Legislature, as manifested by the

journals ; and I am not prepared to say the general terms of the enacting part cannot receive such a construction, notwithstanding it may be felt to be a forced one, and very much at variance with the impression which the recital and the apparent scope and purpose are calculated to produce, and did produce on my mind.

However, without longer regard to strict reading or interpretation, I am now satisfied that the clause was intended to afford a more comprehensive discretion than I had been able to persuade myself, irrespective of the proceedings in the legislature during the passage of the bill ; and consequently, so far as at liberty to notice and elicit therefrom an explanation of the grounds, inducements to, and objects of, the section in question, I can have no further difficulty in acquiescing in the views entertained by the rest of the court ; and admitting the authority to exercise a discretion sufficiently wide, I formerly intimated my readiness, under all the circumstances, to concur in reversing the decree.

BOULTON, Hon. H. J., Ex. C.—This being an appeal from a court of equity, whereby the evidence as well as the equity arising thereon is submitted to our consideration, I think it most convenient in the first place to determine what facts material to the decision of the case are made out in evidence, and then to apply myself to the equities alleged on either side to arise thereupon.

1810, December 8. At this time I find, that Thomas Smyth being seized in fee by indenture of bargain and sale, in consideration of the sum of 233*l.* 11*s.* 3*d.*, conveyed the premises in question to Joseph Sewell in fee, subject to a proviso for redemption thereof, on payment of the said sum of 233*l.* 11*s.* 3*d.*, with interest on the 3rd August, 1811. That the premises consisted of four hundred acres of wild and uncultivated land, on the river Rideau, in the township of Elmsley, and district of Johnstown, affording a site on the bank of the river for the erection of mills to be turned by water power of vast extent ; but at the same time remote from any settlement, without roads, and without any trade, commerce, or other appliances of civilization to enhance their value.



Under all the circumstances set forth in the evidence (exclusive of my own personal acquaintance with the state of the country at the time) the paucity of inhabitants, the scarceness of money, and the consequent absence of almost any demand for landed property so situate, which, when deciding on facts arising upon the evidence, I cannot exclude from my mind, I am of opinion that the consideration expressed in the deed, could not have been regarded at the time as manifestly inadequate to the cash value of the property, and one of the best proofs that my opinion of the then estimation of its value by those who had ample means of judging, is correct, is shewn by the fact, that during the ensuing fourteen or fifteen years, the grantor Thomas Smyth was unable, even by appealing to the generosity and kindly feeling of friends, to obtain any advance upon that amount and the interest thereon.

1819, July. In Trinity Term, the grantee, Joseph Sewall, recovered a judgment in the Court of King's Bench, for 467*l.* 2*s.* 6*d.*, being the amount of the mortgage money and interest, and 13*l.* 13*s.* costs ; none of which have been paid.

1825, August 8. By deed-poll of this date, the said Joseph Sewall conveyed absolutely, in consideration of the nominal sum of 5*l.*, all the said premises to Charles Jones in fee, and all his right to the money secured by the said indenture of mortgage ; the said Charles Jones at the time being Sewall's agent, and thereby becoming in fact a trustee for the benefit of Sewall, who lived in the United States of America.

1825, August 27. The premises were put up to sale at public auction under a "*fiere facias*," sued out upon the said judgment against the said Thomas Smyth, *as still being* regarded as the lands of Smyth, and the same were knocked down to Charles Jones, who was the highest bidder, at the sum of 105*l.* ; and the sheriff of the district of Johnstown, where the lands are situate, executed a deed-poll in the usual form, conveying to Mr. Jones, his heirs, and assigns, *as far as he lawfully might*, all the said lands and premises seised under the said execution, and all the right and title of him, the said sheriff, thereto.

Upon this sale taking place, Smyth removed the mill-irons of a small saw-mill he had erected some years before, and whatever else he had on the premises capable of being removed, and of which he could make any beneficial use; and the property was allowed to pass into the hands of Mr. Jones, who continued in possession until 30th July, 1827, when he, by deed-poll, in consideration of a sum of 600*l.*, not materially variant from the amount of principal, interest, and costs, due on the judgment, granted, bargained, sold, aliened, transferred, conveyed, and confirmed, remised, released, and forever quitted claim to Truman Hicock and James Simpson, their heirs and assigns for ever, as tenants in common, two-thirds to Hicock and one-third to Simpson, of all the estate, &c., of the said Charles Jones, either at law or *in equity*, of him the said Charles Jones, of, in, or to the premises in question.

1827. The act, under the authority whereof the Rideau Canal has been constructed, was passed in the early part of this year, and the canal was in progress long before the conveyance next in order was executed, which was in

1831, January 21. By indenture of this date, between the said Truman Hicock of the one part, and James Simpson of the other part, the said Truman Hicock, in consideration of 500*l.*, did grant, &c., all his estate, &c., either at law or in equity, in the undivided one-sixth part of the said lands, in addition to the one-third conveyed to him by the former deed, confirming him in the one-half of the entire property.

1831, April 11. By deed-poll, the said Truman Hicock, in consideration of 1000*l.*, conveyed all his right, &c., at law and in equity, to a further one-sixth of the said premises, to the said J. Simpson and his heirs.

1831, May. By deed-poll of this date, the said Truman Hicock, in consideration of 1000*l.*, conveyed all his right, &c., to the said property, either at law or in equity, to Abel R. Ward, his heirs and assigns, for ever.

1832, February 21. By indenture of this date, between the said James Simpson and Abel R. Ward of the one part, and William Simpson of the other part, it is witnessed that the said James Simpson and Abel R. Ward, in consideration of 5000*l.*, granted all their estate, &c., either at law or in

equity to the said William Simpson, his heirs and assigns forever.

The property having been laid out into village lots, and otherwise sub-divided, parts thereof have been transferred to divers persons at various prices, and at the period when the bill in this cause was filed to redeem, in the year

1840. A considerable village had extended itself over parts of it; mills, shops, and other establishments for business had been erected, and the property had become of very great value and of vast importance. The chief cause for the great advance in the value of this property was, in my judgment, the construction of the Rideau Canal, the river Rideau at this portion of it forming part of that great national work. If the canal had never been enterprised, the property, from the increase of population, and general improvement of the country, would by that time have probably become a place of some importance as a mill site, and otherwise convenient for general business, but bearing no comparison with the enhanced value occasioned by the construction of the Rideau Canal. The minor facts of the case, which have been stated by other members of the court upon a former occasion, I have not thought it necessary to recapitulate; but I have thought fit to set forth the principal and leading features whereon I found the judgment at which I have arrived, upon the main and indeed only important question which occasioned a division in this court at a former sitting, viz., whether the Court of Chancery in Upper Canada be bound to decree *quasi stricto jure* as of right, redemption of this mortgage upon the facts disclosed and found by the court to exist in this case.

The minor questions I shall shortly dispose of first, and then apply myself to the substantial and all important point of the case.

I never entertained a doubt, since I began to practise at the bar, of the utter inefficiency of a sale by execution founded on a judgment at law against a mortgagor, of any interest supposed to remain in him, called the equity of redemption. At common law, assuming for a moment that no equitable jurisdiction had ever existed, the estate of the mortgagee was an estate upon condition, subject to be de-

feated by the mortgagor performing the condition by paying the mortgage money, but until the mortgagor shall have fulfilled the condition or been discharged therefrom, the fee at law is as much and as thoroughly vested in the mortgagee as if there were no condition at all.

What is the language of the recitals in every conveyance of mortgaged property after condition broken? Why, that the estate of the mortgagee hath become absolute at law; and is not such language, contained in the recitals in every such conveyance for centuries past in England, the best running commentary upon what was regarded by all men learned in the law to be the consequence of a neglect to perform the condition. It is analogous to the language of records and pleadings in our courts, which are looked upon as the most authentic exponents of what the law is in those cases. I am sure the language of recitals in conveyances which have come under the consideration of courts both of law and equity in Westminster Hall, and after having been subjected to the severe scrutiny of the ablest men at the bar, has in no solitary instance been even suggested to be of doubtful fitness for the occasion.

I am aware that numerous, perhaps hundreds of instances, may be found in our common law courts in Upper Canada, of the supposed interest of the mortgagor having been sold, as in this case, under a "*fieri facias*" against the lands of the mortgagor at the suit of the mortgagee, brought either upon a bond accompanying the mortgage, or on the covenant contained therein, for the payment of the mortgage money; but a host of such ill-advised proceedings constitute no legal precedent, unless sustained by judicial sanction; and I always did, and do still, regard such sales as utterly nugatory and inoperative in law, having no shadow of authority to warrant them. The simple and plain answer to the question, why cannot you sell the mortgaged estate under an execution, at the suit of the mortgagee against the mortgagor? is shortly this: that the estate belongs to the plaintiffs, and not to the defendant.

How a court of equity looks at the estate, is a totally different question, and has no influence whatever upon the aspect in which a court of law is bound, *stricto jure*, to regard



it. In point of equity, however, I am inclined to think were it necessary to resort to the sale to sustain the appellant's case, that however inoperative as a legal transfer of a supposed equity of redemption, it might receive and ought to be regarded with much favour, as a sale of the estate by the mortgagee for the benefit of the mortgagor, it having been made by his sanction in the most public and advantageous manner for the mortgagor, with a view to realize the incumbrance and return the overplus to the mortgagor; such sale by the creditor would have been quite consistent with the principles of the civil law, whose maxims with regard to mortgages have been very much adopted by our courts of equity, and would be the voluntarily carrying out of a stipulation often inserted in mortgages, authorising the sale of the estate upon condition broken. Such a fair and open procedure, in the absence of any compulsory tribunal to direct its adoption, certainly ought to weigh strongly in favour of the mortgagee under such circumstances, he doing voluntarily precisely what a court of equity would have done, had it been possible to have invoked its authority for the benefit of the mortgagor.

Upon the second point, I concur in the opinion heretofore expressed by this court in this case, that the demurrer having been overruled, and the defendant having submitted and put in his answer, cannot be heard upon appeal against that decision to which he has submitted, and thereby, so far as in him lay, waived the objection.

To the last and most important question, still to be disposed of, I have applied myself to the best of my skill and judgment, feeling strongly the deep responsibility resting upon my shoulders under the circumstances in which I am placed, seeing that this court has heretofore been equally divided.

Before entering upon any particular application of the principles, either of law or equity, which have been evoked on either side as bearing upon this question, I shall endeavour to shew what the principle of equity is which is applicable to the redemption and foreclosure of mortgages in England; and shortly to trace the progress of equity as a system of jurisprudence, and as contradistinguished to law

as administered by distinct tribunals in England, where I believe the former first took its rise, and in very remote times; and I shall then proceed to consider when equity, in the sense thus explained, came to form part and parcel of the jurisprudence of Upper Canada.

I am very sensible of the difficulty I have imposed upon myself, in thus attempting to define equity as a system of judicial procedure, since to most definitions which have been given, there are, I apprehend, many exceptions to be made, when from generals we descend to particulars.

Our courts of law act upon fixed and determinate principles, which every man is supposed to know, and which, constituting the common law of England, every man has a right to appeal to those courts to enforce for his benefit, however harsh or severe the conduct of the party may be who urges their application in the particular instance; and these principles being applicable *stricto jure*, the courts of law never had any discretion vested in them to withhold their application when their exertion was demanded by any suitor. It is manifest, that any strict rule of law, however admirable in itself as a general principle to govern men in their ordinary dealings and intercourse with each other, must necessarily, even in the early stages of society, lead to occasional results inconsistent with the principles of natural justice which the law was intended to promote, and which, if such consequences could have been foreseen, would probably have been excepted from the rule.

It may appear singular, but I believe it to be nevertheless true, that we are indebted to the arbitrary power of our kings in the remote periods of English History, for the first application of that power, which has gradually through the lapse of ages settled into that well defined and very beneficial exercise of lawful authority, at present administered by our Lord Chancellors, called equity.

The commencement of this authority, there can be little doubt, arose in the first instance of its exercise from the interposition of the arbitrary power of the sovereign upon petition, either to restrain the unconscientious exercise of a legal right, or to enforce the restitution of that which the ordinary courts afforded no means to the injured party to reclaim.

The exercise of this power by the sovereign, assisted by his great officers in council, being found beneficial at least to the weak and unprotected, became gradually of more common occurrence, and was ultimately transferred to the keeper of the great seal, who on this account probably is called the keeper of the king's conscience, which was the only rule of decision in the exercise of his own arbitrary power; and thus the Court of Chancery has gradually assumed a jurisdiction and extended its authority until the present day, and has moulded for itself, and established upon the broadest foundation, a system of jurisprudence previously unknown in any other country.

The present form of a bill in chancery, which is in the style of an humble petition, and not of a bold demand as at common law of a positive right, affords pregnant proof that the relief sought was not originally demandable as of right, but was sued for to, and granted by, the sovereign at first as a matter of discretionary grace and favour as his own conscience should direct. Moreover, the remedy is altogether *in personam*, either restraining or coercing the party complained against; and in this light I cannot agree with those writers who attribute to equity the office of corrector of the law. It may correct the party who seeks against conscience to enforce the law, but it cannot alter one jot or one tittle of the law itself. It can restrain a party from urging an extreme legal right contrary to natural justice, and it can compel him to restore that of which he has become possessed by the enforcement of a like right in a like manner.

The Court of Chancery cannot obstruct the current of the law; it can only inhibit a party from availing himself of its power.

In case of a bond with condition forfeited, before the statute Wm. III., the Court of Chancery interposed to prevent the obligee recovering the penalty. It did not affect to alter the contract or the law resulting from its breach; but it said, although the law is in your favour, and you have *stricto jure* a right to the penalty, yet it is unjust that you should, under the circumstances, enforce that right, and therefore upon the obligor fulfilling his condition, you shall be perpetually restrained from pursuing your legal remedy.

The exercise of this authority has imperceptibly acquired the sanction of the state, and has moulded itself into a system which, undoubtedly, taking its rise in the stringent application *in personam* of arbitrary power, has become uniform and regular in its application, and guided no longer by arbitrary will, but by sound discretion, and sustained by prudence.

It is said "that equity being opposite to regular law, and "in a manner an arbitrary disposition, is still administered by "the king himself, and his chancellor in his name, *ab initio*, "as a special trust committed to the king, and not by him to "committed to any other. And it is true that the one " (that is, law) is bound to rules, the other absolute and unlimited, though out of discretion they entertain some forms "which they may justly have in some special cases."

The learned author of Principles of Equity, in his introduction, observes that "equity, scarce known to our forefathers, makes a great figure; like a plant gradually tending to maturity, it has for ages been increasing in bulk, "slowly indeed, but constantly."

The same learned author further observes, that causes of an extraordinary nature, requiring some singular remedy, could not be safely trusted with the ordinary courts, because *no rules* were established to direct their proceedings in such matters; and upon that account such causes were appropriated to the king in council. In process of time the pressure of business became so great, that this authority devolved upon the Court of Chancery.

Sir William Jones has traced to the Chief Archon of the Athenians, a jurisdiction analogous to that of our chancellors; and many writers regard the Roman Prætor as an officer exercising a very similar authority. Lord Hale says, "touching the equitable jurisdiction of the Court of Chancery, "in ancient times no such thing was known;" and he says, "two things might possibly give its original, or at least "must contribute to its enlargement—The usual committing of particular petitions in parliament, not there determined, unto the determination of the chancellor, which "was as frequent as to the council, and when such a foundation was laid for a jurisdiction, it is not difficult for it to "acquire more. Second, by the invention of uses."



I have endeavoured thus, I fear imperfectly, to trace the cause, origin, and progress, of the equitable jurisdiction of the Court of Chancery, which that most eminent judge, Lord Hale, says, "hath attained *de facto* by degrees that "ample jurisdiction in causes of equity, that now it hath in "effect swallowed up the courts of law," for the purpose of shewing that as courts of law were bound by strict rules, as before adverted to, equity has been introduced to relieve parties from the consequences; of a strict application of them and that although courts of equity in England have, in modern times, consolidated their jurisdiction, and limited the exercise of the ancient discretionary power, they assumed by precedent, which now restrains courts of equity within known bounds, and regulates their proceedings by fixed rules and settled principles, as certain in their application as those governing courts of law ; yet we must not suffer those fixed rules and precedents in the English Courts of Chancery to produce injustice, by applying them here under a totally different concatenation of circumstances, and thereby, in fact, enforce the application of rules of equity adopted by a court under one condition of things, at the instance of a suitor *stricto jure*, under different circumstances, to produce a greater evil than the common law, if left to itself, could have effected.

It has been said, by a very learned judge, that as the Statue of Frauds was introduced for the prevention of fraud, it shall not be converted by a party into an instrument of fraud ; so, in my judgment, as the Court of Chancery was established for the advancement of equity, it shall not be converted into an instrument of iniquity.

In England, from the earliest period of its exercising authority as a court of equity, the Court of Chancery has been open alike to both parties, and that simple fact preserves a harmony of equity throughout its extended jurisdiction, so that either party could at all times have appealed to its authority to conclude the other, with regard to their respective rights, in matters within the scope of its equitable jurisdiction.

If the mortgagee could appeal to equity to foreclose, so could the mortgagor invoke the same authority to enable

him to redeem his estate. From this circumstance it happens, that after twenty years' acquiescence without reclamation, by analogy to the Statute of Limitations, which, although until lately only binding in courts of law, served as a guide to regulate the discretion of courts of equity, the court will not allow the one party to foreclose, nor the other to redeem, because in the first case it presumes payment, if the mortgagee has suffered his mortgagor to remain in possession all that time, without payment of interest or admission of the debt—although the presumption thus raised is open to be rebutted; so on the other hand, if the mortgagor has suffered the mortgagee to remain in possession twenty years without accounting or without admitting that he holds a mortgage title only, he loses his right of redemption, because he shall be presumed to have *deserted* his equity to redeem.

But in this province, before a court of equity was established, how could any presumption in either case arise?

In the absence of a court of equity, the mortgagee being in possession twenty years could raise no presumption to the prejudice of the mortgagor, who could not compel the mortgagee to account nor disturb him in his possession, or file a bill to redeem; and in the case even of the mortgage of a productive property, it could not be presumed, because the mortgagee received the rents, and took no steps to foreclose and enforce payment, that he was therefore content to receive his interest, and allow his money to remain on mortgage, since he had no alternative; and however much he might need his money, and might anxiously desire to call it in, yet in the absence of a court of equity he could not foreclose, and therefore the mortgagor ought not *stricto jure* to be entitled to redeem, so long as he should come within twenty years, however inequitable the attempt might be as against the mortgagee, provided he came within the English rule as to mere time.

It is said by Fonblanque, "that a man can never be injured if he receive principal, interest, and costs," which in England a man is supposed to be satisfied with if he do not file his bill to foreclose; but if there be no court to decree foreclosure, no such presumption can arise, foreclosure being impossible.

It is true the Chancery Act, 7 Wm. IV., chap. 2, sec. 6, declares that the rules of decision in the Court of Chancery, thereby constituted, should be the same as govern the Court of Chancery in England. This enactment I conceive to mean nothing more than that equity, as administered in England, shall constitute the rule of decision in our Court of Chancery, in the same manner, and in the same sense, as the law of England is declared by statute 32 Geo. III., ch. 1., sec. 3, to be the rule for the decision of all matters of controversy relative to property and civil rights in our courts of law.

In England it is of course for a mortgagor to redeem within twenty years; and at the same time it is equally of course for the mortgagee to foreclose if he be so minded.

But in Upper Canada, until the Court of Chancery was established, no means existed whereby the mortgagee could foreclose, and therefore on a bill to redeem a mortgage which had become absolute at law, before the establishment of the court, the rule of equity which would govern the case in England is invoked under circumstances essentially different; and therefore, in my judgment, is not *per se* to be necessarily applied as a stringent enactment, whether the effect produced shall be good or evil. I am of opinion, that before the establishment of the Court of Chancery, those rules of decision, or that system of jurisprudence called equity, as administered in England in the Court of Chancery, did not exist in Upper Canada. For although the word *equity* is used in 32 Geo. 3, chap. 1, sec. 4, and occasionally in other acts of the legislature, yet I cannot regard these expressions even as indicative of the legislative mind, that equity as a system had been or was thereby intended indirectly to be recognized as a rule for the decision of questions regarding civil rights, when they abstemiously forbore for half a century to establish any tribunal wherein such a system could be administered.

To declare that equity as a system shall exist, and decline the establishment of a tribunal for its administration, may with great propriety of language be said to be a "*delusion, a mockery and a snare.*" How can there be a rule which no man can see, and no authority proclaim or enforce? A court

of law cannot see an equity, cannot recognize it in its decisions; then how can the subject be held bound to regard as a principle of action that which no tribunal in the land can promulgate?

Equity as a system of jurisprudence is essentially an emanation from the court, and cannot exist without it. The court and its functions constitute a whole. The court is to the principle of equity to be administered there, what the body is to the soul. Destroy the body, and the soul flies away; abolish the court, and equity is no longer to be found.

Laying it down, therefore, as a principle, that up to the passing of the Chancery Act, 7 Wm. IV., equity as a system had no place in the jurisprudence of Upper Canada as a rule for the decision of matters of controversy relative to property or civil rights, it will be necessary to consider what were the rights of the parties urging a claim to the property in question, at the time of the passing of this act, and the consequent introduction of equity as a principle or rule of decision as it previously existed in England.

Although it was, no doubt, common for gentlemen bred to the profession in Upper Canada, where the English law has ever prevailed, to speak of equity as a principle, and to speak of an equity of redemption as a beneficial interest in an estate, with which their reading English books had made them familiar, yet I am constrained to advance it as my deliberate judgment, that no such interest as that existed in Upper Canada, excepting in so far as the common and statute law recognized it and would give it effect.

By the 7 Geo. II., chap. 20, it is provided, that where any action shall be brought on any bond, for payment of money secured by mortgage, or for performance of covenants contained therein; or where an action of ejectment shall be brought by any mortgagee to recover possession of any mortgaged lands, if the person having a right to redeem shall become defendant, and shall, pending such action, pay such mortgagee, or in case of refusal shall bring into court the principal, interest, and costs, such payment shall be taken to be in full satisfaction and discharge of such mortgage, and the court shall discharge such mortgagor there-



from accordingly, and shall compel such mortgagee to assign, surrender or reconvey such mortgaged estate, and deliver up all title deeds to the mortgagor.

When Sewall brought the action in 1819, against Thomas Smyth, for the debt secured by the mortgage, the principle, interest, and costs of suit might, under this act, have been paid into court, and Sewall ordered to reconvey, which it is plain, from the evidence, he would cheerfully have accepted and done. If Smyth were not even then prepared to pay the amount, still he might have continued in possession, and driven the mortgagee to his ejectment after the sale in 1825, and then paid the money into court; whereas on the contrary, he thereupon abandoned the property, removing every fixture which was worth taking away, and voluntarily relinquished possession.

Thus from 1810 to 1825, the mortgagor's equities, which might have availed him had the Court of Chancery existed at the time, might also have been protected by the ordinary courts of law, had he thought fit to invoke their protection, but which he declined; and the estate ultimately passed into the possession of the mortgagee, and his interest at law became effectually foreclosed.

This statute, in fact, affords all the relief to the mortgagor which a Court of Equity could have given while the possession remained unchanged. Upon the mortgagee taking steps to recover possession of the land, which at law would work a foreclosure if the money were not tendered under the statute, the *mortgagor had notice* that the mortgagee required his money, or would insist on his right to the estate. A bill of foreclosure would have had the same effect, and if the money were not paid within a prescribed period, the mortgagee would have been effectually foreclosed in equity; and if the court of law were not applied to for an order upon the mortgagee under the statute, and the mortgagee allowed to get possession, the same result would be arrived at, at law; the possible difference being, perhaps, a little more delay in equity, through the comparative tardiness of chancery proceedings as contrasted with those at law. So that it is plain that a party declining to avail himself of the very salutary provisions of the statute, but allowing the mortgagee

to proceed to judgment, and a recovery of possession, has no one but himself to blame, if after such *effectual notice* he make no arrangement to save his estate from forfeiture.

Thus stood the law, in my judgment, before the passing of the Chancery Act, as affecting the rights of mortgagor and mortgagee.

It now remains for me to consider what change was produced by the passing of that statute.

Upon the establishment of a Court of Chancery, all subsequent transactions would come under all the rules and principles of equity as established by precedent in England; but how equity should have relation back to former transactions consummated before equity existed in the province, is the difficult and important point to be decided.

This question I shall consider, firstly, without reference to the language of the Chancery Act, and solely upon the general principles governing courts of equity left to their own unfettered judgment; and secondly, with reference to the language of the statute establishing the court.

In my judgment, a Court of Chancery would, upon its own inherent principles of action, take cognizance of any cause arising out of transactions happening before its establishment, as well as after, unless restrained by positive enactment. Equity operates not inversely to the law, but in some cases to restrain persons from exercising their legal rights against conscience, as in the case of a mortgage, for example, of an estate worth 1000*l.* made to secure a smaller sum, say 100*l.*

The time when the jurisdiction became established could not alter the abstract principles of *equum et bonum* being applied to the case, although it might, and probably would, induce the court to look at circumstances which would not have been regarded had a court of equity always existed.

Take the present case as an instance: Had a Court of Chancery always existed to which either party might have appealed to enforce the fulfilment of the original intention of both, viz., that Sewall should get his money and interest, and that Smyth should retain his estate, there would be no pretence for not holding both to the strict rules of equitable procedure which govern in England; because if Sewall

wanted either his money or the estate, he could have filed his bill of foreclosure in 1811, and had his money or the land finally assured to him within such reasonable time as the court should assign for the money being paid, or the mortgage standing foreclosed.

If, under such state of the law, he took no step to foreclose, but simply acquired possession of the estate, any change in its condition or character as a mere mortgagee in possession would have been at his own peril, seeing that a bill to redeem might have been filed against him at any time.

But in the absence of all equitable jurisdiction, where each party knew that the terms of their contract must bind them at law, unless there were something manifestly and grossly unjust and oppressive in the conduct of the mortgagee, a court of equity would scarcely feel itself warranted in retrospectively interposing its authority to disturb the legal rights of the parties. But to warrant such interference, there must, in my judgment, exist something so manifestly harsh and unjust, and against conscience, as to shock and be offensive to the mind *boni viri*, as the civilians express it. And under such circumstances I feel no doubt but that a court of equity would look back into the transactions, and in the exercise of a sound judicial discretion, apply the principles of equity to the subject.

In this case I see no facts to raise any presumption, that injustice has been done; on the contrary, I think that the law has done nothing but justice, and such justice as might doubtlessly have been, and would have been, attained by a decree, had a Court of Chancery existed previously to the assumption of possession under the mortgagee.

As to the value of the property, it seems, to say the most of it, to have been but a bare security for the debt.

In the next place, although by law the mortgagee was not bound to sell the estate at all for the purpose of realizing his debt, as he might have kept it on condition broken; yet he did, under a misapprehension of the law, cause it to be advertised and sold in a *quasi* official manner, after a year's notice published in the usual mode of sales under sanction of judicial command; therefore practically every thing was

done which either a trustee with power of sale or a master in chancery under a decree of the court could have done, to sell the property for the benefit of all parties for the best price that could be obtained. Therefore I am of opinion that there existed no circumstance which would warrant a court of equity in disturbing the legal interests of the parties, the court being left to the exercise of its own unfettered application of the principles governing courts of equity, more especially as the mortgagor may, I think, be regarded as having *abandoned* all claim to it, by not applying for relief under the statute of Geo. II., and also, by *removing* the fixtures and whatever else he could beneficially apply to his own use, sanctioning by his silence and non-resistance, what was passing under his own observation without objection. He, and the respondents since the death of the mortgagor, saw the property passing from hand to hand; witnessed the vast improvements going on; and one of the respondents, Terence Smyth, in a letter, dated 10th May, 1832, addressed to James Shaw, a person about to purchase part of the premises from A. R. Ward, one of the appellants, and who shortly afterwards did purchase, stating, "that the title depended upon the legality of the sheriff's deed, together with his father's right of redemption agreeable to the laws of England with regard to mortgages; but in his (Terence Smyth's) opinion, he (Shaw) or any other person might purchase without any fear of being disturbed by his father."

It is a clear principal of equity, that where a person claiming an interest in land lies by, and by his silence with regard to his own claim encourages another to expend money upon the estate under an erroneous opinion of title, he shall be restrained in equity from affirming his title to the prejudice of the other so lulled into security.

*Qui tacit, consentire videtur; qui potest et debet vetare, jubet si non vetat.* The mortgagor should undoubtedly have protested against what was being done, and should have warned the parties of his intention to apply to a court of equity, should such a tribunal ever be established; but he did nothing of the kind, and allowed possession to be taken. I do not mean to say that such protest would have altered the



case as to the rights of the parties, but it would have rebutted the idea of an intention to abandon his claim in equity. It does therefore appear to me, that when a party with a full knowledge of his position makes an effort to defend it, but voluntarily abandons and deserts it, and see those whom he has let in under a claim of right, using the property and dealing with it as their own, and expending large sums in its improvement without remonstrance, he cannot be regarded in any other light than as sanctioning, by his silence, what is passing under his own eye without objection.

If a party voluntarily pay a doubtful demand, and decline defending himself against what he regards as an unfounded claim, he cannot afterwards become plaintiff and recover back the money so voluntarily paid.

Inasmuch therefore, as the mortgagor neglected to avail himself of the protection which the courts of law could have afforded him under the statute 7 Geo. II., I think he must be regarded as giving the mortgagee, and those claiming under him, to understand that he abandoned the property in payment of the debt.

I am also of opinion, that the subsequent great rise in value of this property, occasioned chiefly by the construction of the Rideau Canal, the rapid growth of a village, since become a place of considerable importance by the enterprize and capital of the appellants, and those claiming under them, constitute no meritorious ingredients in the respondents' claim for relief.

We all know, that it is from the expenditure of capital that situations the most eligible owe their value, by bringing them into notice, and attracting population to participate in the local advantages of new settlements; and it would be no compensation to the first adventurer, who risked his means in commencing a settlement, and developing the capabilities of the place, after having spent the most valuable period of his life in establishing an extensive business in the midst of a wilderness, drawing a considerable population around him, attracted by the activity to which he had given the first impetus, to have his own improvements valued, and an improved rental set upon lands which owed all their value to his own capital, enterprize, and exertion, and striking a

balance, to order it to be paid to him, and then to quit the scene of all his hopes for ever.

In my opinion, such a person is as much entitled to the enhanced value of the ground, as he is to the cost of the buildings and other improvements he may have constructed, as the one is, especially in a new country, incident to the other. If a man shall have laid out his capital recklessly upon what he knew he had no title to, the case would be very different; but if, acting *bona fide*, he is entitled to every consideration that a court exercising a wise and sound discretion, can extend to him; and unless constrained by some clear and positive enactment, I should feel great repugnance in disturbing the legal title of persons presenting themselves so favourably to the notice of the court, under the notion that a rule of equity, as applied in a different state of things, and under very different circumstances, would have been regarded as too well settled to warrant a departure from its rigid application.

Upon the fullest consideration, therefore, that I can give to this case, I am of opinion that, independent of any enactment which may be supposed to enjoin a different conclusion, the respondents have shewn no equitable ground for relief, and that their bill should have been dismissed with costs.

I come now to the last point of this important case, the construction to be put upon the 11th section of the Chancery Act, which his Honour the Vice-Chancellor, in the court below, supported by the opinion of Mr. Justice Macaulay, and Mr. Attorney-General Smith, as members of this court at the first argument, has regarded as imperative upon him, against the real equity of the case, as I understand their judgments, to declare that the respondents are, if I may so express myself, *stricto jure* entitled to redeem.

If I thought that the clause in question required the construction they have put upon it, I should as a matter of duty, though with deep regret, say *fiat justitia ruat cælum*, and dismiss this appeal; but I am of a contrary opinion, and while I entertain the highest respect for the opinion of Mr. Justice Macaulay, who has so elaborately discussed this question, yet I cannot, upon this occasion, see any ground for the conclusion at which he has arrived.

The 11th section of the Chancery Act, 7 Wm. IV., chap. 2, is in the following terms :

“ And whereas the law of England was, at an early period, introduced into this province, *and has continued to be the rule of decision in all matters* of controversy relative to property and civil rights ; while, at the same time, from the want of an equitable jurisdiction it has not been in the power of the mortgagees to foreclose, and mortgagors being out of possession have been unable to avail themselves of their equity of redemption, and in consequence of the want of these remedies the rights of the respective parties, or of their heirs, executors, administrators, or assigns, may be found to be attended with peculiar equitable considerations, as well in regard to compensation for improvements as in respect to the right to redeem, depending upon the circumstances of each case, and a strict application of the rules established in England might be attended with justice : Be it therefore enacted, that the Vice-Chancellor of the said court shall have power and authority in all cases of mortgage, where before the passing of this act the estate has become absolute in law by failure in performing the condition, to make such order and decree in respect to foreclosure and redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators, and assigns, as may appear to him just and reasonable under all the circumstances of the case, subject, however, to the appeal provided by this act.”

It appears to me, in the first place, that the first part of the preamble is conceived in terms inconsistent with any idea that the legislature considered that equity, as a system of jurisprudence, had previously existed in Upper Canada under the general term “law of England,” because it recites that the law of England was, at an early period, *introduced* and had *continued* to be the *rule of decision* ; and yet from the first establishment of *the rule* there spoken of (which I regard as the rule of law only, and as contradistinguished from equity) no decision according to it in any question of equity had ever been made, if equity be insisted on as being included

in the rule from the time of its establishment to the passing of this act, a period of nearly half a century ; and therefore it cannot be said to *have been* and *continued* to be a rule of decision, when no decision ever had been, and during all that time could not have been made according to it ; *lex neminem cogit ad impossibile* ; and when 32 Geo. III., chap. 1, sec. 3, says that resort shall be had to the law of England as the rule for the decision of the same, it must mean such law as resort *could* be had to. And there is nothing inconsistent with the interpretation in the next branch of the sentence, reciting, that for want of an equitable jurisdiction mortgagees could not foreclose, nor could mortgagors avail themselves of their equity of redemption, because an equity to redeem might and would exist when appealing to the conscience, although there might not exist any means for enforcing obedience to its voice.

The latter part of the preamble recites, that a strict application of the rules established in England, might be attended with injustice ; shewing conclusively that the legislature did not intend to fetter the discretion of the court when called upon to exercise its functions in a new sphere of action ; and although the preceding words, “as well in “regard to compensation for improvements, as in respect to “the right to redeem,” might seem at first sight to indicate the objects to which this relaxation of English rules is intended to apply ; yet upon a closer examination, I think they can only be considered as put for examples, rather than as terms of limitation. The enacting part of the clause is couched in as general terms as could well have been devised, to give a most thorough discretion to the Vice-Chancellor to make such order and decree in respect to foreclosure and redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the parties, as may appear to him just and reasonable under all the circumstances of the case—words which do appear to me to make it quite discretionary with the court, under all the circumstances of each case, to decree redemption or refuse it.

If, upon a bill to redeem, the Vice-Chancellor should be of opinion, under all the circumstances of the case, that it



would be neither just nor reasonable to allow the mortgagor to redeem, it would be his duty to dismiss the bill, which in effect would amount to a foreclosure; and such order would be in respect both to foreclosure and redemption, it would be a decree in favour of foreclosure, and against redemption. It is not essential that a decree or judgment should be in favour of a given proposition, to constitute it a decree or judgment *in respect* of such proposition. If the decision be against the proposition, it would be as much *in respect* of it as if it had been in favour of it. Neither do I regard the words redemption and foreclosure as applying to a bill filed by the mortgagor, any more than to one filed by the mortgagee, either result may attend a bill filed for the one object as well as for the other; and I cannot concur with Mr. Justice Macaulay in thinking that this part of the clause is to be construed *reddendo singula singulis*, considering the word redemption as having solely a reference to a bill filed by the mortgagor, and foreclosure to one filed by the mortgagee.

With regard to compensation, the legislature evidently meant to enlarge, if necessary, the discretion of the court in decreeing all just allowances for improvements in cases where the court should feel it right to decree redemption; seeing that in England a mortgagee has no right to alter the nature of property mortgaged, by turning a dwelling house, for example, into a shop. But in a new country, where property is undergoing continual change in every hand it passes into, it would be retarding enterprise to hold, that however advantageous such an alteration might be for whoever might be the owner, no change should be made. The circumstances under which the change may have been made, are all fit for the consideration of the court; and this clause removes any ground for scruple when regarding English precedent.

Under the very comprehensive terms used in the latter part of this section, "and generally to make such order and "decree with respect to the rights and claims of the mortgagor and mortgagee, as may appear just and reasonable "under all the circumstances of the case," it may be worthy of consideration whether, in some cases, it would not be just to require the mortgagee to pay an additional sum to the

mortgagor, bearing a relation to the value of the property when it fell into the hands of the mortgagee, particularly when the mortgagee had made such extensive improvements as not to be within the power of the mortgagor to make compensation for.

But I am of opinion that the court would have possessed full discretion to have accommodated its decisions to the peculiarities incident to the novel condition of things existing at the time of the establishment of the Court of Chancery, and that the 11th section of the Chancery Act ought to be regarded as a provision introduced by the legislature *ex majori cautela*, rather than of necessity; and this construction I regard as important to prevent the very inconvenient construction that might otherwise prevail, of considering every thing not expressly provided for as intentionally omitted, which I feel satisfied would be found occasionally of most mischievous consequence.

We cannot keep too prominently in our minds, that equity is inherently a discretionary principle in its application. And although it be discretionary, the discretion of a court of equity, like that often exercised by courts of law, must be a sound discretion, governed by rule and not by humour; it must not be arbitrary, vague, and fanciful, but regular and guided by precedent—a character which it has acquired by having for ages past been administered in a regular course of judicial procedure, in a court clothed with the highest judicial powers, administered by great numbers of learned, wise and upright judges, who have moulded the arbitrary power, at first exercised by the sovereign, and afterwards delegated to them by the crown, into a regular system of judicial administration, constituting at the present day equity jurisprudence.

But if the rules and precedents established by the court itself, for the government of its own discretion, be once reduced by legislative enactment into fixed rules to guide the court in its decision, inflexible and mandatory upon those who are to be governed by them, the whole character of the rules becomes changed; and having become of positive obligation they cease to be a guide to discretion, but become fixed laws, and then no longer rules of equity, but

positive institutions ; and having thus changed their character, they will likewise change their place of administration from courts of equity exercising extraordinary, to courts of law exercising an ordinary jurisdiction, which would in all time coming be bound to enforce them.

If it were enacted by parliament, that notwithstanding a mortgagor had failed to perform the condition for redemption, by payment of the mortgage money at the day, nevertheless that he should be entitled to redeem within twenty years, the remedy of the mortgagor would be in a court of law, unless there were some peculiar circumstances to give chancery an equitable jurisdiction. He might tender his money, and bring an ejectment.

The legislature cannot change the nature of things, making equity law, and law equity at their pleasure, and still preserving the pristine character of either.

Take from equity its discretionary character, and enforce its regular application by positive parliamentary enactment, and it ceases to be equity the moment it becomes law; the principle of equity would be merged in the stern mandate of the law.

Lord Coke, in speaking of the Court of Chancery, says it possesses an ordinary jurisdiction according to the common law, and an extraordinary jurisdiction according to the rule of equity *secundum equum et bonum*.

How, by an ordinary rule or law, can you arrive at an extraordinary decision? Parliament can no more enact rules for deciding what is equitable *secundum equum et bonum*, than truth in morals can be proved by mathematical demonstration.

I cannot therefore presume that the legislature, intending to establish a court to administer equity, could have also intended to fetter its administration with inflexible rules which might, and occasionally would, (as in this case) frustrate that intention, and compel the court to pronounce a decree which it felt would result in nothing less than manifest injustice.

There being no positive law, that a mortgagor shall have a right to redeem within twenty years, that right, if it exist at all, is merely an equitable one; and therefore, if under

all the circumstances of the case, the court shall be of opinion that it would be inequitable to allow him to redeem, how can he have an equity of redemption, unless it be on the foot of a strict right which the court cannot restrain, or refuse the exertion of; in which case it would not be an equitable, but a legal right, and then not an *equity* but a *right* to redeem. And it is no impeachment of the judgment of the court refusing to decree redemption, to allege that between the same parties, under the same identical facts and circumstances, the court, upon a bill filed by the defendant against the plaintiff to foreclose, undoubtedly as in this case would decree<sup>d</sup> foreclosure; because the prayer to foreclose necessarily embraces a permission or offer to redeem, and therefore it does nothing against the will of either party. If the appellants had been willing that the respondents should have been at liberty to redeem, and had filed a bill to foreclose, unless the respondents redeemed within the time prescribed by the court, they could not have objected to their request being granted; neither could the respondents object, as that would be precisely what they wanted, unless they declined redemption altogether, in which case the whole proceeding would pass as it were by the consent or concurrence of all parties.

The question with reference to the Statute of Limitations, taken either as a prescribed period, or as affording a safe guide for regulating the discretion of the Court of Chancery in that respect, is not in a case arising before the establishment of the court, whether the equity be *barred* by the time, or can by the court be *extinguished* or *rejected*, though put forth within time; but whether, under the circumstances existing, at a period when equity as a system of jurisprudence formed no part of our judicial polity, the court can or ought retrospectively to *raise* an equity, and not whether they are restrained by the Chancery Act, sec. 11, from *extinguishing* it. Such a view of the question always assumes that within twenty years an equity to redeem *exists*, which is begging the whole question; whereas you must first determine whether there be an equity, and if that question be decided in the negative, viz: that the party has no equity, then it becomes unnecessary to consider the question of time.



Having given this very important case the fullest consideration which I have been able to bestow upon it, I am of opinion—

First, that as a system of jurisprudence, equity was not, by statute 32 Geo. III., chap. 1., sec 3, as part of the law of England, constituted a rule of decision in any matter of controversy in Upper Canada.

Secondly, that up to the period of the passing of the Chancery Act, 7 Will. IV., chap. 2, equity, as a system of jurisprudence, had no place in judicial contemplation in Upper Canada, and could neither have been recognized nor exerted.

Thirdly, that mortgages, up to the passing of the Chancery Act, were simply conveyances upon condition; and the estates thereby pledged, liable to absolute forfeiture at law; subject however to redemption after condition broken, under the provisions of the statute 7 Geo. II., chap. 20.

Fourthly, that upon the establishment of a Court of Chancery, such court might exercise its equitable jurisdiction retrospectively, and by its own inherent principles, without any legislative aid.

Fifthly, that the 11th section of the Chancery Act must be regarded as having been introduced more out of greater caution than of necessity; and that the Court of Chancery, without the aid of that section would seem to authorize.

Sixtly, that there is no restraining quality in that clause limiting the court in the fullest exercise of its equitable principles, in relation to the redemption and foreclosure of mortgages, or in any decree tending to constrain the court against its own sense of equity to decree redemption, when it would not have done so had there been no such provision.

And lastly, I am of opinion that the equities of this case are all with the appellants, and that the decree of the court below should be reversed.

McLEAN, J. concurred.

Decree of his Honour the Vice-Chancellor reversed, and bill dismissed.

*Blake* asked for the costs in the court below.

*Esten* considered this a case in which the court would not give costs ; the bill had been sustained by the judgment of his Honour the Vice-Chancellor, and this court on a former occasion had been equally divided in opinion.

ROBINSON, C. J.—And you think it would be unreasonable to expect the respondents to have been better advised upon the law, than his Honour and one portion of this court. We will take time to consider the question of costs ; let the costs be reserved.

NOTE.—It appears, by the Journals of the Legislative Council for 1837, that on the 7th of February the bill entitled “ An Act to establish a Court of Chancery in this Province,” was carried up from the House of Assembly to the Council.

On the 25th of February, the select committee to whom the bill was referred, brought in a report, in which it is stated, “ that the object of “ this bill is the institution of a Court of Equitable Jurisdiction, as nearly “ corresponding with the English Court of Chancery as the circumstances “ and condition of this country will admit.

“ Your committee have given to this measure their most earnest and “ careful attention ; and as it contemplates a very material change in the “ provincial judicature, they have obtained the answers of the three “ judges, as well as both the law officers of the crown, to certain queries “ which were submitted to them, touching the constitution of the proposed “ court, its powers, objects, and proceedings.”

The report of the select committee, and the bill, were thereupon referred to a committee of the whole house.

On the 1st of March, the bill was read a third time ; and on the question being put, whether the bill should then pass, it was carried in the negative ; and upon the house again going into committee, to take the same into consideration, several amendments were made, and amongst them the eleventh clause, which then stood thus : “ And be it, &c., “ that in all cases where a re-conveyance of mortgaged property, in the “ possession of the mortgagee, shall be ordered to be made to the mortga- “ gor, it shall and may be lawful for the Vice-Chancellor to consider “ whether any, and what allowance, should be made to the mortgagee for “ improvements by him made on the mortgaged premises while in pos- “ session thereof, before any reconveyance or delivery of possession of the “ mortgaged premises shall be ordered to be executed or made,” was expunged and the present clause inserted.

Of the questions submitted to the judges and law officers, the eighth and ninth are the only ones directly bearing on this clause ; and these, together with the answers, I have extracted from the Appendix to the Journals, as tending to explain the view taken by his lordship Mr. Justice Macaulay, and are as follow :

*8th Question.*—It is contemplated by this bill, that the Court of Chancery shall have power, on the ground of equity of redemption or inadequacy of consideration, to interfere with mortgaged estates in possession of mortgagee or assignus, or purchasers at sheriffs' sales; and if so, is it not expedient, and would it not promote the ends of justice, to restrain the court from interference in such cases?

*9th Question.*—Is it desirable that the court, at the time of its establishment, should be empowered to extend to mortgagors the advantage of equity of redemption, to a period antecedent to the 1st of January, 1827? Real estate, it is well known, passes in this country very rapidly from one owner to another; and land, which when mortgaged may have been in its original wild state, frequently becomes after five or six, or more successive transfers, well cultivated and improved. Is it advisable, taking these circumstances into consideration, that a mortgagor should be allowed the privilege of redemption after the mortgagor, or some assignee or purchaser, has been in possession for the space of ten years? Is it advisable in any case, except perhaps when the mortgagee has been an infant, or married woman, or that the mortgagee had treated the estate within that time as liable to be redeemed, or that some other special circumstance existed?

*Answers given by the Honourable the Chief Justice (ROBINSON).*

*To the 8th.*—It must, doubtless, be intended that the Court of Chancery shall have power to allow mortgagors to redeem.

The mere ground of inadequacy of price, is seldom, if ever, entertained in equity as a reason for interposing, though it is very often taken into consideration as an ingredient in a case where fraud or imposition is imputed.

There can be no danger, I think, in allowing a Court of Equity here to proceed on the same principles as the Court of Chancery in England; they are not arbitrary or dangerous, but sound and well established, and are in advancement of justice.

There is no ground, as I conceive, laid by this bill for interfering in regard to sheriffs' sales in particular.

*To the 9th.*—I look upon this as one of the most difficult considerations attending the establishment of the proposed court. We adopted the law of England in 1793, and by that law mortgagors have always had an equity of redemption as in England, though they have had no means of availing themselves of it, after they have parted with the possession, for want of a court in which to file a bill to redeem. It would seem unjust on the one hand, that the lapse of twenty years should preclude a man, when he had not within that twenty years any remedy within his power; and on the other hand, the knowledge that there was in effect no equity of redemption, may reasonably have encouraged mortgagees or their assigns, especially after a long time has elapsed, to consider the estate as absolute, and to deal with it accordingly.

When the sum originally secured by the mortgage was nearly equal to the value of the property, one would feel an inclination, under such circumstances, to treat the estate of the mortgagee as absolute; but where the sum was but small in proportion to the value, the inclination would be to grant relief, unless the circumstances were such as to create peculiar difficulties. It is impossible to go minutely into this

question at present; I conceive it would be difficult, if not impracticable, to lay down by a general law, any rule that could operate justly in all cases

The appointment of a good judge, with unfettered discretion in each case, and a proper appeal from *his decision*, seems the best method of meeting the difficulty.

*Answers of the Honourable Mr. Justice Sherwood :*

*To the 8th and 9th Queries.*—I think it is intended by this bill, that the Court of Chancery here should proceed in favour of a mortgagor, in the same manner, and to the same extent, as in England, whenever it appears that an equity of redemption exists according to the known principles of equity. Where there is a clear equity of redemption, the mortgagor may redeem in England at any time within twenty years after the legal estate and possession vested in the mortgagee.

In equity, a mortgagee is only considered as a trustee, and the deed of mortgage as a security only for the money lent, and no estate in reality passes to the mortgagee in equity by force of the conveyance. The right of redemption, however, is considered in equity as an estate in the land itself, and may be granted by deed, or devised by will. As our legislature introduced the law of England into this province at a very early period, I can see no good reason to vary from the equitable part of it, except so far as it is necessarily varied by acts of parliament passed in England or in this province. A creditor in this country generally takes a bond and mortgage simultaneously, to secure his debt, and often recovers final judgment on the bond, and proceeds to sell the land under a writ of *fieri facias*, issued by virtue of the statute 5th Geo. II. Under such circumstances, if the mortgagee or a stranger should purchase the mortgaged premises at sheriff's sale, I think such purchaser ought to be considered as the owner of the equity of redemption; because the mortgagor has ample time to redeem, between the entry of final judgment and the sale of the land, which never takes place in less than fifteen months, and generally at a more distant period. There is also a further reason for this opinion. My present impression is, although the point has not yet been decided, that the equity of redemption may be sold by the sheriff under an execution against the lands of the debtor, by virtue of the statute 5th Geo. II. ch. 7; and in that case, a mortgagee, who has the legal estate under the deed of mortgage, and the equitable estate under the sheriff's sale, must possess an unconditional title to the land. With respect to the smallness of consideration, I believe that a court of equity never interposes on that ground alone, where no fraud exists or is imputed. If fraud be established, then indeed the court should always take cognizance of the matter.

*Answers of the Hon. Mr. Justice Macaulay :*

*To the 8th.*—It might well bear the construction supposed, at least over all cases arising within twenty years. It would be just to render sheriffs' sales equivalent to sales under decrees in chancery, where the purchasers have satisfied and become assignees of the mortgagees; for the debtors might have prevented such sales, by paying off their debts. It is, however, a floating question whether an equity of redemption can be legally sold under a writ of *fieri facias*. In the State of New York it is expressly prohibited. Where the possession has long been changed,



or *bona fide* sales made for fair value, by absolute conveyances, duly registered, it might in many instances be equitable to protect the parties. But it, would require some consideration to frame a clause on this subject; and if approved in principle, perhaps discretionary powers in the court on all such occasions, to be exercised according to the circumstances of each case that might come before it, would be most expedient. Redemption might thus be granted or withheld, as justice might require.

*To the 9th.*—This is matter of opinion, and rests in the wisdom of the legislature. Many reasons could be urged in favour of abridging the period now allowed for redemption in this province. The time varies in the different neighbouring states; and while mortgagees can derive so little advantage from yearly profits, or otherwise than by actual sale, the analogy between this country and England does not hold. But whenever a court is established, a creditor may, at any time after forfeiture, file a bill to foreclose, or for a sale, which would be decreed subject to such short delay in favour of the debtor as might seem equitable. The future would be attended with quite as little embarrassment as the past. The parties to all subsisting mortgages have vested interests under the law as it now prevails; and although not an insuperable barrier, any innovations demand cautious deliberation. No such consideration could influence future transactions, if the law were now to be altered prospectively.

*Answers of* ROBERT S. JAMESON, *Esq., Attorney-General:*

*To the 8th.*—Inadequacy of consideration is not in itself ground for the interference of a court of equity. In all matters relating to mortgages, I conceive that the court would feel bound to decide with express reference to the state of the law and judicial institutions of the province when the mortgage was given, and the existing legal remedies in the contemplation of which the parties entered into the contract; and that the rights acquired according to such laws, and with a full knowledge of such remedies, cannot now be shaken, unless those rights were acquired by fraud. In this respect no new principle is introduced; since even at law, such titles would be equally vitiated by fraud, if a court of law possessed the same power of discovery as is possessed by the Court of Chancery.

*To the 9th.*—The answer to this question appears to be contained in that to Question 8. I think it would be best to leave the court unfettered by any rules, except those by which *as a court of equity* it would in its very nature be bound; that its interference should be limited, not by a particular time, but by the question of fraud or no fraud in acquiring the possession predicted.

*Answers of* CHRISTOPHER A. HAGERMAN, *Esq., Solicitor-General.*

*To the 8th.*—Any restraints in these respects would, in my opinion, interfere with *equity*. But the Vice-Chancellor must be regulated by law, in cases where any positive law exists; and where none does exist, his decrees will of course be regulated by the equitable claims of *all parties* interested in the estate.

*To the 9th.*—I think this matter, if deemed worthy of consideration, should be the subject of separate legislation; it could not properly, in my opinion, be introduced in the present bill. Much may be said in favour of a measure of this description; but I am not prepared to say

that any mortgagor should be deprived of his equity of redemption, or have that right interfered with as regards *past* mortgages. It is to be presumed that this right was well understood, and in contemplation of all parties, at the time of the execution of these securities (a).

Upon reference to the former argument of this case, it will be seen that the court then unanimously decided, chiefly on the authority of *Lidbetter v. Long*, "that if, for any part of the relief prayed, other parties are necessary to be brought before the court, a demurrer to the whole bill will hold."

His lordship the Chief-Justice, who delivered the judgment of the court on that point, said: "The question upon the demurrer is, whether a plaintiff can be allowed to go down to the hearing, and to take evidence before the hearing, upon a bill which certainly does pray redemption against a number of parties who are not made defendants in the cause. Have they not an interest in being heard, for fear the court may, though they need not, make a decree which may affect their interests? And though such decree might not, in fact, be suffered to affect them, on account of their not being made parties, yet the course of the court requires that they shall have before them all those whose presence may be necessary for enabling the court to deal *finally, effectually, and justly with all the interests involved*. The plaintiffs, as it seems to me, though I express the opinion with very little confidence, from not being conversant with equity proceedings, would hardly be allowed to say, in answer to the demurrer, 'We will at the hearing take a decree in such a shape as that the absent parties can have no concern in it.' The court, I think, must say to them, 'You should have framed your bill, and brought your suit, in such a manner as that the court might deal with it as justice and their rules require. Whereas here, relinquishing nothing, you have asked for several things which we cannot grant you in the absence of parties who are, by your own shewing, interested in opposing your claim. And you do not limit your prayer so that we can say we should be stopping short, with your assent, of granting all that you are claiming;'" and *Richardson v. Hastings* and *Lidbetter v. Long* were referred to by the learned judge.

This decision, however, it is apprehended, has not been borne out to the full extent by a recent decision in England; and nothing but the fact of having found a decision differing from that expressed by the court in this case, would induce me to presume to express the slightest doubt upon the subject, it having been the unanimous judgment of all their lordships, even if such judgment were not strengthened, as it would at first sight appear to be, by the opinion expressed by Lord Cottenham, in the case of *Lidbetter v. Long* (4 M. & C. 286).

The case of *Lewis v. Cooper*, argued before Sir L. Shadwell on the 10th November last, and reported in the *Legal Observer*, at page 45, it is submitted, is strong to shew that the demurrer in *Simpson v. Smyth* should not have been allowed, at least not on the grounds assigned for allowing it. The note of the reporter in *Lewis v. Cooper* is, "*A demurrer for want of parties cannot be sustained because the bill asks some*

(a) See Journals of L. C. 1837, pp. 115, 174, 186-7; and Appendix. p. 76.

*"relief which could not be given in their absence, if there is relief asked which could be given on the record constituted as it is."*

The report of the case is very short, and I have therefore extracted it—

"This was a demurrer for want of equity and want of parties. The bill was filed by a shareholder in a projected railway company, called the 'South and Midland Junction Railway Company,' against the directors, with the view of compelling them to refund a sum of 55,000*l.*, which it was alleged they had applied contrary to the provisions of the deed constituting the company, in part payment of the expenses of the Manchester and Poole Railway Company, with which they had entered into an agreement to amalgamate.

"The bill prayed that the 55,000*l.* might be distributed among the shareholders of the South and Midland Junction Company. It was contended that the bill was defective, in praying that the sum in question might be distributed without providing for the previous payment of any liabilities of the company which might remain unsatisfied; and also, that it did not state with sufficient precision that the acts of the directors exceeded the powers given them by the deed. The demurrer for want of parties rested upon the proposition that the court could not effect the main object of the bill, namely, the distribution of the fund to be recovered among the shareholders, without having them all before it." *Terrell*, for the demurrer, cited several cases, and amongst them, *Walworth v. Holt*, 4 M. & C. 619, and *Taylor v. Salmon*, 4 M. & C. 134. *Bethell*, for the bill, was not called upon. The VICE-CHANCELLOR: "The demurrer must be overruled. Had the only object of the bill been to have the 55,000*l.* distributed amongst the shareholders, it would have been necessary that all should have been before the court. Here, the bill seeks to have that fund secured, which must be for their benefit, whatever is subsequently done with it. *This, therefore, is relief which can be granted upon the bill as at present framed; and it is not a sufficient objection, that the bill goes on to ask for more, which cannot be granted.*"

*Lidbetter v. Long* was not cited; but it is hardly possible to suppose that that case could have escaped the observation of counsel, when we find two cases cited from the very volume in which it is reported, or that it would not have presented itself to the mind of the Vice-Chancellor, if he had considered that it materially affected the decision of the one before him, as it was an appeal to Lord Cottenham from a judgment given by Sir L. Shadwell himself, and which was affirmed. That case, as reported in *Milne & Craig*, is as follows:

*"A bill may be demurred to as a whole, for want of parties, if any part of the relief prayed is such as cannot be granted in the absence of a person who is not made a party to the bill."*

"The facts, as stated in the bill, were, that the defendant, being the lessee of land, under a covenant to build upon it, and having mortgaged it to the plaintiff before the buildings were completed, and a forfeiture having subsequently been incurred in consequence of the non-completion of the buildings within the period specified by the lease, a written agreement was made between the plaintiff, the defendant and the lessor, by which the plaintiff, at the request of the defendant, contracted with the lessor to furnish the buildings and to pay the rent in arrear, and also

"to pay the growing rents during the continuance of the plaintiff's security, and to give notice to the lessor of any transfer of the security; and the lessor contracted with the plaintiff to waive the forfeiture, and also, at the request of the plaintiff, and with the consent of the defendant, to grant a new lease to the plaintiff for the residue of the term granted by the original lease, in case all the covenants should have been performed, in the event of the plaintiff having procured a release of the equity of redemption from the defendant, or having become the absolute owner of the leasehold premises.

"The bill alleged, that the plaintiff had proceeded to complete the buildings; and in so doing, and in paying the arrears of rent, and in keeping up insurances, and otherwise maintaining his mortgage securities, he had expended considerable sums of money.

"The prayer of the bill was, that the plaintiff might be declared to be entitled to a charge upon the mortgaged premises for the monies expended by him in completing the buildings, in paying the arrears of rent, and in keeping up the insurances, and the other charges before mentioned, with interest; and that an account might be taken of what was due to the plaintiff for principal and interest upon his mortgage security, and in respect of the monies so expended, and that the defendant might be decreed to pay what was so found due, by a day to be appointed by the court, or that in default thereof, the defendant and all persons claiming under him might be foreclosed, and might deliver up all deeds and papers to the plaintiff; and that the plaintiff might be declared to be absolutely entitled to the benefit of the above-mentioned agreement, and to the new lease of the premises thereby agreed to be granted to the plaintiff by the lessor, with the consent of the defendant; and that the defendant might be directed to join in such new lease, or in such deed or instrument as might be necessary for giving effect to the said agreement.

"The defendant demurred to this bill as a whole, assigning as grounds of demurrer, first, multifariousness; and secondly, the absence of the lessor as a party.

"Mr. *Wakefield* and Mr. *Stone* contended that the bill was not demurrable on either of the grounds alleged; and as to the second ground, they urged that the bill sought to enforce the defendant's concurrence in such lease as the lessor might grant to the plaintiff, and not to compel the lessor to grant such lease; and that, at all events, the lessor's being a party was not essential to the relief asked by the first and most material part of the prayer of the bill, namely, the foreclosure; and that if plaintiff should at the hearing (as he probably would) waive the other part of his prayer, it could not be said that the lessor's presence was essential, in order to enable the court to make a decree upon the bill as it at present stood.

"The LORD CHANCELLOR said that the bill was defective for want of the lessor as a party. The bill prayed, in fact, a specific performance of an agreement, to which the lessor was a party; and although that might not be a material part of the plaintiff's case, yet it was part of the relief prayed, and the question must be, whether, upon the relief prayed, the cause could proceed in the lessor's absence.

"Mr. *Wigram* and Mr. *Heathfield* were to have supported the demurrer.



It therefore appears, that the party in whose favour the decision was made, in each case, was not called upon to argue; and if the two cases have been correctly reported, it would seem difficult to reconcile them with each other, and the reporter's note of each case is directly opposed the one to the other. However, it is evident that in neither case was the judgment of the court given in writing; and it is barely possible that the language attributed to Lord Cottenham may not have been exactly what was made use of by him; for he is made to say that "the bill prays, in fact, a specific performance of an agreement, to which the lessor was a party; *and although that might not be a material part of the case,*" &c. Now, it is submitted that it was a very material part of the relief; for it is reasonably to be presumed that the plaintiff had been in possession of the mortgaged estate from the time of the agreement; and before the defendant would have been allowed to redeem, he must have paid off all the monies mentioned by the plaintiff in his bill, and which he prayed might form a charge upon the premises; and besides, it was not prayed as an alternative, as in the principal case—which fact was greatly relied on by the counsel in argument—but formed part and parcel of the one single prayer, the foreclosure being only ancillary to the decree declaring him entitled to a specific performance, which could only be carried out by the lessor, and who was not a party. But if *Lewis v. Cooper* be law, then even on that restricted prayer, the court might have ordered the usual account and foreclosure, leaving the plaintiff at liberty afterwards to proceed against the lessor, if he refused specifically to perform the agreement. One is therefore almost driven to the conclusion, that the court must have considered the specific performance of the agreement the main object of the bill, the decisions in effect being by the same judge. But the judgment pronounced by Sir L. Shadwell, when the case was before him, is not reported, at least so far as I have been able to discover.

If this be not the proper construction to put upon the decisions come to in the two cases of *Lidbetter v. Long* and *Lewis v. Cooper*, thus reconciling the one with the other, it is submitted that this point in equity pleading is still open for decision, unless indeed there is a distinction to be taken, when an objection for want of parties is made, between a defect arising from the want of plaintiffs, and one arising from the want of parties, defendants—a distinction, however, which, it is submitted, neither the principles of equity pleading, the notes of the reporters, nor the language used by the court in giving judgment in either case, would lead one to believe did exist.

The question in *Simpson v. Smyth* having been decided upon another point, namely, the waiver of the *right to appeal*, after submitting to the decision of the court below and answering, it is of very little importance, as de from the mere question of costs, which view of the point is the correct one; but having seen the report of *Lewis v. Cooper*, which certainly seems at first sight, if correctly reported, to be directly counter to the view taken by the Court of Appeal, I have thought it due to the profession thus to bring the point under their notice.

## IN THE EXECUTIVE COUNCIL.

[*Before the Hon. the Chief Justice ; the Hon. Jonas Jones, Ex. C.; the Hon. J. B. Macaulay, Ex. C.; the Hon. Mr. Justice McLean; and His Honour the Vice-Chancellor of Upper Canada.*]

MARCH 16, 17, AND APRIL 6, 1846.

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR  
OF UPPER CANADA.

*Between* JOHN YOUNG BOWN.....*Appellant.*

AND

ALDEN BAKER WEST .....*Respondent.*

## INDIAN RIGHTS—RESCISSION OF CONTRACT.

Where a party, complaining of fraud in the execution of a contract, filed a bill to have it rescinded, and it appeared that after discovering what was alleged as fraud on the part of the vendor, the vendee had continued to deal with the property, the subject of the contract :

*Held*; That on that account, if even the fraud had been clearly established, the vendee was not entitled to the relief prayed, and that the same rule must prevail in granting or refusing relief in cases where the title to the lands in question is vested in the crown, as where the lands have been granted. (a)

*Blake and Brough*, for appellant.

*Sullivan and Esten*, for respondent.

ROBINSON, C. J., delivered the judgment of the court. The plaintiff in this cause complains of the defendant having deceived him in the sale of some real property, or rather of the defendant's interest in it; and he prays to have the contract rescinded on the ground of fraud, or that compensation may be made for an alleged deficiency in the quantity of land which he was led to believe he was acquiring. Enough is disclosed in the case to enable us to see, that the contract between these parties was for the sale of what is commonly called in this country Indian lands, being part of the large tract upon the Grand River, in the district of Gore, which the government of the Province of Quebec, before the division of the province into Upper Canada and Lower Canada, set apart and reserved for the exclusive

(a) See this case, 2 Jurist, 287.

occupation of the six Nations of Indians, who at the conclusion of the American Rebellion were compelled to abandon their former possessions in the revolted colonies, on account of their adherence to the British Crown.

The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants. What particular regulations have been made with this view, was not in evidence in this cause; but we cannot be supposed to be ignorant of the general policy of the government, in regard to the Indians, so far as it has been made manifest from time to time by orders of council and proclamations, of which all people were expected and required to take notice. In the second year of Queen Victoria, a statute was passed (ch. 15), the object of which was to prevent trespasses upon lands reserved for the Indians; it has no provisions which can affect the case before us. But we know that besides this attempt to restrain people from intruding as trespassers upon Indian lands, the government has always been desirous to deter and prevent white inhabitants from bargaining with the Indians for the purchase of their lands, though their efforts to that end had been very far from being effectual. In the case of Doe on the demise of Jackson v. Wilkes, to which his Honour the Vice-Chancellor alluded in his judgment in this cause, the nature of the Indian title or right *to this territory* upon the Grand River, came under the consideration of the Court of King's Bench, and what was before known to every person conversant with the public acts of the government of Upper Canada at an early day, was in that case proved. This large tract of land on the Grand River, extending from the mouth of the river on Lake Erie, to its source, and comprising a breadth of six miles on each side of the river, having been with other lands purchased by the government from its aboriginal inhabitants of the Chippawa nation, was set apart by the government for the exclusive use and *occupation* of the Six Nations of Indians; and the intention of the government to retain it always for their use and benefit, was formally declared in an instrument signed by General Haldimand, Governor in Chief of the

Province of Quebec, in the year 1784, and sealed, not with the great seal of the province, which would have been necessary to constitute it a patent, but with the seal at arms of General Haldimand. The Government of Upper Canada, acting not by any means in derogation of the right of the Six Nations of Indians, but acting on their behalf and for their benefit, and upon a full understanding with them, has disposed from time to time of parcels of this territory in order to raise funds for the support and assistance of the Six Nations. In the ejectment case in the King's Bench, which has been referred to, Jackson, the lessor of the plaintiff, was a purchaser of a small piece of this land which had been thus sold for the Indians through the agency of the government, and he claimed under a patent from the crown, which had been issued to him in 1835, on the completion of his purchase. Wilkes, the defendant, being in occupation of that piece of land (but by what right it did not appear), endeavoured to maintain himself in possession by contending that the patent to Jackson was invalid, by reason that the crown had divested itself of the legal estate in the land by the instrument made by Governor Haldimand, in 1784, and was therefore not in a condition to make the grant to Jackson in 1835, under which he claimed. The Court of King's Bench decided against the objection, for the reasons given in their judgment, and upheld Jackman's title, considering that the crown was not divested of the legal estate by the instrument which Governor Haldimand had signed. I am not surprised that it should have appeared to his Honour the Vice-Chancellor to follow, as a consequence of this judgment, that the interest which Bown, the plaintiff in this suit, represents himself to have bargained for with the assignee of the Indian, Duncan, was not such an interest as can form the foundation for a bill for relief. The truth, no doubt is, that he and the defendant West, were bargaining about lands which, though they have been attempted to be passed from one person to another by various transfers, belonged all the time wholly to the crown; they were lands which the whole of the Indians in a body could not have alienated, because they had no legal estate in them,



and of which any individual Indian could still less pretend a right to alienate any particular parts.

This was undoubtedly the fact, looking merely at the actual state of the legal title, and without considering the proclamations which are known to have been issued from time to time by the government, forbidding people from presuming to purchase what it was declared the Indians had no right to sell; and which proclamations, though they might not be allowed to affect the legal rights of parties, might perhaps be found entitled to weight in considering a claim to equitable relief. If the government indeed had been determined rigidly to prevent all trafficking with the Indians for the lands which they were allowed to occupy, they could perhaps not have taken any measure more effectual and expedient for that purpose, than by procuring a legislative provision, that no right or interest which any party should pretend to acquire by any such transfer, should be made the subject of any suit or remedy in courts of law or equity. But in the absence of any such enactment, I think we cannot go the length of holding that no equity could grow out of the dealing which the parties in this suit have had, and for this reason only, that the lands, respecting which the plaintiff says he was bargaining, belonged at the time to the crown; and we are the more unable to refuse to go into the case upon that ground, when we find it relied upon as a part of the plaintiff's case, and not denied, and when indeed every one knows the fact to be, that the government, in proceeding as they have done, to sell portions of this Indian tract for the benefit of the Indians, have in general made it their rule to protect the white men whom they find in possession of portions of the lands under purchases or agreements with the Indians, to this extent, that they reserve to them a right of pre-emption in the lands which they have occupied and improved. This may in some cases, according to the extent and value of the land occupied, be a very substantial interest, and such as a court of equity could hardly refuse to acknowledge when they are applied to with a view to obtaining a remedy against positive fraud. These dealings in this country respecting land of which the legal estate is still in the crown, or which the crown has

divested itself after it had become the subject of contracts and agreements between individuals, are very likely to give rise to peculiar equities, which the courts here may have to decide upon without the aid of cases adjudged in England upon the same points. The case of *Jeffreys v. Boulton*, which was determined by this court last year, in appeal from the Court of Chancery, is one of that description ; and it seems to have presented itself to the Vice-Chancellor as material to be considered in connexion with the case now before us. But an examination of the grounds on which that case was decided, which was fully stated in giving judgment, will shew, I think, that we cannot derive much aid from it in deciding the present. What seems to have struck his Honour the Vice-Chancellor as a point in that case which might apply in this, was, that the Court of Appeals objected to entertaining alleged equities as arising out of transactions between individuals respecting lands, the legal estate in which was at that time wholly in the crown ; but that was not exactly the ground. There the king, while he owned the estate, had leased it for a term of years, and the lessee had sublet a small portion of the land, and had assigned his interest in it, respecting which small portion of the lot there had been several transactions ; and afterwards when the term had expired, and the crown sold the whole lot to a purchaser, who in regard to any real or supposed right of renewal represented the lessee of the whole lot, the person who had held the temporary interest in the small portion under the first lessee, set up a right to be allowed to acquire the fee in that small portion by purchase, to the exclusion of the purchaser of the whole lot. The government took the claims of the parties into their consideration, and on their views of what was reasonable declined to separate the small portion of the lot from the other lot on the sale, and made their patent for the whole lot to the person claiming it under the original lessee. It appeared to the court, that it would be unreasonable in itself, and would tend to unsettle titles to a degree very unjust and prejudicial, if after the government, in such cases, had decided upon the claims of parties, and had issued their patent upon their view of what each had a right

expect from them, the parties who had been urging their claims before the government, should be afterwards allowed to go behind the patent, and attack each other upon equities growing out of their contracts antecedent to its issuing.

This was one consideration of several on which the case of Jeffrey v. Boulton was decided. To what extent it would be right to maintain that principal, it was not necessary to determine, because the court independently of it, and upon the facts shown by the parties, was of opinion that the plaintiff did not make up a claim to such a degree as he prayed for; and besides, that case did not, as regards any consideration of this kind, resemble the present, where the crown has made no patent to either of the contending parties, or to any one, and when other facts on which the bill is founded have not, as it appears, been decided upon by the government, or in any manner brought under their notice. It will be found on examining the case of Jeffrey v. Boulton, that the Court of Appeal did not lay down a principle so broad, as that there could not be a suit in law or equity growing out of a contract between parties, respecting an interest in lands which at the time were legally vested in the crown. Questions of this kind are amongst the most important, from local circumstances, that can arise in our courts. It is of great consequence, that we should be as consistent as possible in the view which we take of them, and this we can be best insured by endeavouring to keep the way clear as we proceed. Upon the merits of the case before us, after the best consideration which I have been able to give to the pleadings and evidence, I coincide in the opinion of the Vice-Chancellor, that he could not properly do otherwise than dismiss the bill.

The plaintiff's statements in his bill, amount in substance to this : first, that the defendant, in the early part of September, 1843, agreed to sell him, for 265*l.*, *all the estate, right, title, interest, and possession of him the defendant*, of and in a certain one hundred and thirty-four acres of land in the township of Brantford, which are described by metes and bounds in the bill. Secondly, that in pursuance of this agreement, the defendant did, on the 14th September, 1843, execute a writing under his hand and seal, by which he granted



bargained, sold, &c., to the plaintiff, his heirs and assigns, all the right, title, claim, possession, and demand whatsoever of him the defendant, in and to certain deeds of assignment therein specified, which deeds are described in the instrument executed by the defendant, viz: "of and in *the annexed assignment or quit-claim from John McDonald to the said Abraham Bradley and from the said Abraham Bradley to Alden Baker West.*" thirdly, that when defendant agreed (as plaintiff states) "to sell him all his estate, right, title, interest and possession of and in the one hundred and thirty-four acres described in the bill," and (as I understand the plaintiff's statement) before the deed of 14th September, 1843, was executed, he, the defendant, represented himself as having a leasehold, or some valuable and transferable estate of and in the one hundred and thirty-four acres described in the bill, and as being entitled to the possession, and being in fact in possession thereof. Fourthly, that the plaintiff paid 112*l.* 10*s.* on account of the purchase-money before and at the time of the bargain, and gave his note at seven days' sight for the residue of the 265*l.* agreed to be paid by him as the purchase money. Fifthly, that the purchase having been thus far completed, the plaintiff's agent in the transaction, Robert R. Bown, after the execution of the assignment of 14th September, 1843, went with the defendant to view the premises, and received possession. That he then received possession of a tavern, situated on the said tract, which was occupied by a tenant of the defendant; and that the plaintiff believed that the possession so given to him of the tavern, was given as possession of the whole one hundred and thirty-four acres. Sixthly, that some days after this, the plaintiff was informed by one Hanson, the tenant of the defendant, and then for the first time learned, that the defendant had only an interest in thirty acres of the one hundred and thirty-four, and had been in possession of no more. Seventhly, that the 112*l.* 10*s.*, paid by the plaintiff, is more than those premises are worth, of which he obtained possession. Plaintiff charges that the defendant, when he agreed to sell him the property, well knew that he had no valuable interest in the whole one hundred and thirty-four acres, and that he neither had, nor



was entitled to have, possession of more than thirty acres ; that he induced the plaintiff to enter into the agreement by misrepresentations and suppression of the truth of matters within his own knowledge ; and that he, the plaintiff, has in fact received no consideration for the promissory note which the defendant holds for the unpaid portion of the purchase money ; and he prays to have the contract rescinded, and the note ordered to be delivered up to him ; or that compensation may, if he elects it, be decreed by an abatement in price.

In those parts of his answer which the plaintiff has read in evidence, the defendant admits, that about the year 1834, one William Parker was in possession of about fifteen or twenty acres of Indian land, being part of the Indian tract near Brantford, with a dwelling house thereon ; that he entered into treaty with Parker for the purchase of his right and interest in and to these premises ; and that in the course of their treaty, Parker produced as evidence of his title to the premises, an assignment from one Duncombe, (otherwise, it seems, called Duncan) an Indian, whereby he conveyed to Parker all his right, interest, and possession of and in *the said dwelling house, and the land thereto adjoining*, containing one hundred and thirty-four acres more or less, as surveyed by Mr. Lewis Burwell, and including the cleared and improved land which Parker had offered to sell him ; and the defendant admits, that he believes the one hundred and thirty-four acres to be the same tract as is described in the plaintiff's bill. That he believed, that by taking an assignment of this deed, which Parker held from Duncan and by taking possession of the dwelling house and cleared land, (which were the immediate objects of his purchase) he would acquire not only a right to keep possession of the dwelling house and cleared land, but also a right to enter on the remainder of the surveyed tract of one hundred and thirty-four acres, and to take actual possession by clearing and fencing. That under this impression he gave 125*l.* for the purchase, and took an assignment of Duncan's deed, and was put into possession of the dwelling house and cleared land adjoining, and remained in possession from that time till the sale to Robert R. Bown, plaintiff's agent.

This is the account he gives of the origin, nature, and extent of his own title. He then says, that while he was thus in possession he cleared and improved about fifteen or twenty acres more of the tract of one hundred and thirty-four acres, and enclosed the whole cleared land being about thirty-five acres, and built a tavern thereon with out-houses. That one Bradley, while defendant was in possession, held the deed from Duncan to Parker, and the assignment of it to the defendant, as a security for a debt due to him by the defendant; of which circumstance the defendant informed Robert R. Bown, who thereupon advanced him 62*l.* 10*s.*, in order to enable him to pay Bradley his debt and take up the deeds, which the defendant had told him must be done before he could *transfer the writings to him*. That the defendant then paid Bradley, and got his deeds, including (as the answer says) the deeds from Duncan to Parker, and from Parker to the defendant, (what other deeds besides these there could have been we are left to conjecture, for no other deeds than those two had been hitherto mentioned, either in the answer or the bill.) He says he exhibited these deeds to Robert R. Bown, who examined them, and expressed himself perfectly satisfied with them. This is the whole amount of defendant's admissions read in evidence. On the other hand he denies, in his answer (folio 27), that such negotiation as is mentioned in the bill, or any other negotiations, except such as he the defendant relates, was at any time concluded, "or that the plaintiff agreed to purchase the "interest or possession of defendant, or any other estate, "interest or possession of or in the premises in the said bill "mentioned."

The defendant states, that when the agreement was made and until after the transfer by him had been actually signed, he knew nothing of any one but Robert R. Bown in the transaction, and considered he was dealing with him as principal, and not with the plaintiff his son. It is possible therefore, that in the last section of this part of his answer, he may only intend to deny that he made with the *plaintiff* any such agreement as is stated in the bill; but still he does deny in general terms any negotiations about a purchase, except such as he himself sets out; and in folio 24

of his answer, he expressly declares that except as he has stated in his answer, "no agreement was at any time entered into by and between defendant and plaintiff, *nor any agreement by or between any other parties for the sale or purchase of the premises in the said bill mentioned, or any part thereof;*" so that the answer does in fact deny any agreement by the defendant for sale of the premises, except such an agreement as he himself states; and does therefore deny the allegation in the bill, on which the whole equity was founded, that in September 1843, he agreed to sell to plaintiff, for 265*l.*, "all the estate, right, title, interest, and possession of the defendant of and in the one hundred and thirty-four acres of land described in the bill;" unless the agreement as it is stated in the answer amounts to that. That depends upon the construction which it is fair to give the words "*premises,*" "*premises aforesaid,*" &c., as used in various places between the third and ninth folios of the answer. The point does not seem very clear, and indeed so far as anything said by the defendant, in these parts of his answer last referred to, could furnish any admission of an agreement not proved by writing, and thus serve to help the plaintiff, were the difficulty created by the Statute of Frauds it is to no purpose to weigh their precise import, because the plaintiff has not made those statements in the answer evidence by reading them. It is only necessary to consider the transfer in connexion with such parts of the answer which refer to them under the saving words "except as aforesaid," with a view to discover what the defendant can be properly said to have denied on his oath, and what the plaintiff is consequently under the necessity of proving by such evidence as the practice in equity requires. Having read over these passages repeatedly, and with attention, I cannot satisfy myself that we can justly understand the defendant as saying anything more in his account of the bargain, as given in his answer from the beginning to the ninth folio, than that he bought from Mr. Barker the premises which he occupied, namely, the house and cleared land of which he was in possession, hoping to acquire, by such purchase and subsequent extension of his improvements, an interest in a further part of the one hundred and



thirty-four acres, or in the whole of it, through Duncan's deed to Parker, of which he took an assignment; and when he states in the 5th folio, that he cleared fifteen or twenty acres more, and fenced the whole clearing of thirty-five acres, and built there a tavern and outhouses, and directly after states that Robert R. Bown came and offered him \$1000 *for the premises aforesaid*, I think he means for the premises which he had so described, and which he had reduced to possession, that is, the tavern and cleared land which he could deliver over, and not the unimproved remainder of the one hundred and thirty-four acres, which he had merely hoped to add to his possession in proportion as he could clear and improve it; but which unimproved remainder of the tract (as Burwell had surveyed it,) he does seem to have been quite willing that Bown should have the same claim to, that he had, that is, the claim of making whatever he could of it, under the writings which he was transferring to him. Thus stands the case upon the bill and answer, in regard to the plaintiff's first allegation as to the extent of the interest and property sold to him; but independently of any question on the Statute of Frauds, which it will be necessary hereafter to consider. In regard to the plaintiff's next allegation of what the defendant did actually assure by the deed of 14th September, 1843, there is no question, because the deed is truly set out, and speaks for itself. Then as to the plaintiff's statement, that "defendant represented himself as having a leasehold or some valuable and transferable estate *of and in the one hundred and thirty-four acres described in the bill*, and as being *entitled to the possession, and being in fact in possession thereof*," the plaintiff has certainly not read from the answer any admission of that charge, and the answer (folios 10, 16, and 23,) negatives such representation, not perhaps in terms so precise as it might have done; though when the defendant in folio twenty-three, swears, that "*except as aforesaid*," he did not at any time represent himself as having any valuable or transferable, or other estate or interest of or in the tract of land, in the said bill described, (that is the whole of the one hundred and thirty-four acres,) either as being entitled to, or being in fact in the possession thereof; and when



there is nothing in the answer acknowledging any such representation, or amounting to it, we cannot say that there is not such a denial of the representation alleged as throws upon the plaintiff the whole burthen of proving it. The statements in the bill, of the defendant having gone after the sale and put plaintiff's agent in possession of the tavern, giving it to him as possession of and for the whole one hundred and thirty-four acres, are clearly and explicitly denied ; and as to the charge, which is indispensable to the case as one of fraud, viz : that the defendant well knew, when he made the agreement, that he had no interest in the one hundred and thirty-four acres, and that he neither had, nor was entitled to have, possession of more than thirty acres, he, the defendant, denies that he had ever represented himself to be so entitled, or in possession of the one hundred and thirty-four acres ; it was not necessary for him to disclaim any knowledge of his want of interest or title to such possession, for the purpose of relieving himself from a charge of positive misrepresentation ; but so far as it might be necessary to relieve himself from the charge of fraudulent concealment of his knowledge of the non-existence of certain facts which he must have known the plaintiff to have believed in, and by which he must have supposed him to have been influenced in making the purchase, it would be material to the defendant to deny the guilty knowledge imputed to him, notwithstanding he had made no direct representation inconsistent with it. The answer does contain such a denial, for the defendant swears (folio 57), that except as he had before stated, he did not know that he had not any valuable or assignable interest in the whole of the premises in the bill mentioned, or that he neither had, in fact, nor was entitled to have, the possession thereof, nor any greater portion than thirty acres or thereabouts. What he did know on the subject, is what the deeds disclosed, and what he has before stated as to the condition of the premises. Thus the case appears to stand upon the bill and answer.

Then we have to consider that the plaintiff grounds his claims to relief on an allegation that the defendant agreed to sell him "all his estate, right, title, interest and possession of and in the certain one hundred and thirty-four acres

“described by metes and bounds in the bill,” and he produced the deed made upon the occasion of the sale, which instead of conveying “*all the defendant’s right,*” &c., to any particular one hundred and thirty-four acres of land, merely assigns and transfers all defendant’s right, title, claim, possession and demand of, in and to “*a certain paper annexed to the deed,*” which is therein described as an assignment or quit-claim from one McDonald to Bradley, and from Bradley to the defendant. Assigning all a man’s right and interest in a certain tract of land is a very distinct thing from assigning all his right and title to a certain paper which concerns that land, even supposing the land referred to in the one case and in the other to be clearly and completely identical.

Besides, the deed from McDonald to Bradley did not assume to convey a title to any land, but only assigned to Bradley his right and claim *in a certain sheriff’s deed or assignment annexed*. McDonald’s deed was made on 12th January, 1842; the sheriff’s deed annexed, was made 29th March, 1838, and purported that upon a writ of *fi. fa.*, in which one Barry was plaintiff against this defendant West, and one Lodor, defendants, he the sheriff had seized, as a chattel of Lodor’s, an unexpired term of twenty-one years, in certain lands specified in an assignment thereunto annexed, dated 28th July, 1835, from Parker; which assignment one would expect to find was an assignment to Lodor, but it is in fact an assignment to this defendant West, the other debtor in the *fi. fa.*, who it appears did on the 8th February, 1837, assign to Lodor, by writing endorsed, all his interest in the instrument executed to him by Parker, and the sheriff by his deed assigns to McDonald, for 96*l.*, as being purchaser at the sale, “*the residue of the term of twenty-one years assigned by “Parker to defendant West;”* but first created by a deed of the Indian Duncan, made 20th December, 1831, granting a lease for twenty-one years, to Parker.

Then, when we come to look at the deed by which Parker assigned to West, and which is the foundation up to that time of all this chain of title, we find it a deed by which Parker assigns to West, not any one hundred and thirty-four acres of land, but “*all his improvements in a certain one hun-*

"*dred and thirty-four acres of land, described by metes and bounds*" in the deed, and which is the same as the plaintiff described in his bill. There seems to be some confusion in the matter, for this deed, instead of being what the sheriff's deed describes it, an assignment of a term of twenty-one years, is a conveyance to hold to West *in fee*; but in the *habendum*, as well as in the granting part, the conveyance is confined to *the improvements and buildings only*. I mean that the deed does not profess and assume to make a title to any thing else, but it does in the conclusion add, that the grantor thereby assigns to West, his heirs and assigns, "all right, title and interest which he has or can pretend to and in *the land above described* (that is the one hundred and thirty-four acres) *substituting the said West in his full right to, and place in, the premises above described,*" and concluding thus "turning and transferring from me, to and in favor of the *said West, &c., the said lands and premises with all that has followed or may follow them.*" It can hardly fail to strike one here, how differently Parker, from whom this defendant received his title, ventured to deal with the one hundred and thirty-four acres generally, and with that part of it which he had cleared and occupied; the latter portion he takes upon himself to convey as people ordinarily convey an estate, but when he speaks of *the whole lands* above described, including the one hundred and thirty-four acres, he ventures only to "turn over his right to West," and puts him in "*his place,*" with "*all that may follow them.*" I mention this as tending to make very probable the defendant's statement, that he had made his agreement with the plaintiff with similar caution to that which had been used in selling out this non-descript title to himself. When Parker made this deed to West, he held a deed made 10th March, 1834, made by the Indian Duncan to him, assigning as Parker afterwards did his *buildings and improvements made on the one hundred and thirty-four acres*. And this deed is more remarkable, because Duncan covenants only that "*he is the true owner of the improvements and buildings, according to the custom of the Indians, by his own labour having made the same;*" and he therefore takes upon himself to convey the buildings and improvements to Parker *in fee*, and to give this covenant that

he had a right to sell them. But in the same spirit that Parker afterwards acted in assigning to West, he quits claim and surrenders up in addition, all the right and interest (whatever it might be) which he had to the whole described tract of one hundred and thirty-four acres; engaging that if ever the Indians should yield up the land to the king, whereby Parker might have an opportunity to purchase, he would do nothing to oppose his claim, and would not cause or advise any other Indian to make claim to it; but as far as he could, he would protect him in the peaceable possession of it. It does not appear from these papers, from what quarter the sheriff could have taken his idea of a term of twenty-one years; but the document printed as exhibit K. explains it. That was a deed made 20th December, 1831, by Duncan to Parker, leasing for a small annual rent, for twenty-one years, two hundred acres of land described by metes and bounds, *which carry the limits on one side "to the "farm or land occupied or possessed by the widow Tuttle"*—(which is important as shewing, that no one, claiming under this deed at least, could suppose he had a right to interfere with Mrs. Tuttle's possession). In this deed Duncan covenants, that Parker shall enjoy all the premises demised during the term. Of course, if the one hundred and thirty-four acres, as described, form part of the tract described in this lease, then the deed to Parker, in 1834, from the same person, of all his interests in the lands, would extinguish the term that was by this deed granted to him; but still, as the sheriff did sell the residue of a term only, specifying its commencement and duration, and not *all the interest* which the debtor had in the land, and sold it under a writ against chattels, which can only operate upon a term, we cannot look upon this plaintiff as being entitled to more under the said assignment of the sheriff's deed, than the deed could convey, and nothing more is in fact assigned by defendant's deed to the plaintiff, than the mere "*deeds or writings*," from McDonald to Bradley, and Bradley to West. And, admitting that we can by construction understand the assignment of those deeds to be an assignment of the estate and interest conveyed by them, still that interest is nothing but an unexpired term of twenty-one years, and not what the plaintiff



states it to be in his bill, an assignment of *all the defendant's title*, and interest in the one hundred and thirty-four acres of land ; and if when the sheriff's deed is so precise as this is, selling only the residue of a specific limited term, we could extend the effect of the sale and conveyance so as to make it embrace all that the deed from Parker to West could cover, both as to estate and quantity of land, (which I think we could not do), then we must see what the effect of that deed is ; and we find, as I have already stated, that all that it pretends to convey or assure absolutely, is *the improvements or buildings*, and that as to the rest, it merely gives over whatever claim Parker had.

The plaintiff does not complain that he was imposed upon by being drawn in to sign a deed fraudulently made by the defendant, to express something different from what was intended by him ; nor does he pray for relief on the ground of mistake. It was the plaintiff who drew the deed which the defendant signed, and the deeds which are referred to in it were in his hands. If under such circumstances he could come for relief against the deed, on the ground of imposition or mistake, he does not come with any case of that kind ; but he asks us to look upon him as having purchased one thing, when the deed drawn by himself, and which he does not complain of as being executed under any circumstances of fraud or mistake, in regard to what it contained, shews that he purchased another thing. This then is a plain case of seeking to add to, or alter, a written instrument by parol evidence, not an agreement alleged to be subsequently made by parol, and modifying a prior written agreement, in which case such evidence might be received at least to rebut the plaintiff's equity when he is praying specific performance (a) ; but the plaintiff sets up, that the sale, when it was made, was not really the sale of such an interest as the deed imports, but of something more extensive. This is doubly objectionable ; it puts forward a parol agreement for an interest in land which the Statute of Frauds requires to be in writing, and puts it forward to overrule the deed which *was executed* between the parties as

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(a) 2 Ves. 299, 376.

the evidence of the transaction, thereby violating a principle of the common law. It is to no purpose to examine whether such a parol agreement has been proved by the witnesses, for such evidence could not legally be admitted. If there had been no deed or writing, then the only question would be, whether the defendant has by his answer admitted a parol agreement such as the plaintiff sets out, and submitted to abide by it, waiving any objection under the Statute of Frauds. I think we cannot say upon reading the answer, that he has done so ; and I take it to be clear that a case of this kind could not be helped by part performance, because it is a part performance in favour of the plaintiff, so far as taking possession goes ; and as to the payment of the money by the plaintiff, it is only evidence that there has been an agreement to sell, which the deed itself imports ; it is consistent with the deed, and furnishes no excuse for travelling out of it in order to set up by parol evidence a different contract. Otherwise, where a man had paid money upon a purchase of a lot of land, and taken a deed for it, he might, under the pretence of part performance, offer parol evidence, that he had bought two lots instead of one.

Indeed I look upon the Statute of Frauds, as being out of the question here, strictly speaking, because there has been not only a writing, but a solemn deed executed in evidence of this transaction ; and to that the parties are held, (a) so that the question is not whether there should not have been a writing, but whether when there has been a writing, it can be passed by and rendered of no avail to the defendant, by setting up a parol agreement different in its terms, as having been made before or at the time of the deed being executed ; and this without any allegation of fraud or mistake in the wording of the deed. If there had been no writing between the parties, and the only difficulty had been that presented by the Statute of Frauds, we should then have had to keep in view the distinction established by many decisions, between receiving parol evidence of a contract respecting an interest in land for the purpose of rebutting an equity, upon which a plaintiff is seeking to obtain

(a) 4 B. C. C. 514 ; 6 Ves. 334, 328 ; 2 Atk. 303 ; 3 Wills. 275 ; 1 B. C. C. 62 ; 1 Ves. 241 ; 2 B. C. C. 219.

a decree of specific performance, or is praying for any other interposition of a court of equity, in order to change the situations in which the parties would stand at law; and the receiving parol evidence as the foundation of a plaintiff's case, when he desires the active interposition of the court in his favour, to enforce the performance of an alleged agreement respecting lands, such as can only be proved by a writing, and of which he has no written evidence. In the latter class of cases, the courts feel bound to acknowledge the obligation of the statute, because it applies directly and in terms; in the former they have felt themselves at liberty to say that the Statute of Frauds does not direct that every agreement in writing respecting lands *shall be* enforced in equity, whether it be just or unjust; but only that no person *shall be charged* either at law or in equity *upon* any agreement respecting lands, which is not in writing; and wherever there is parol evidence, which satisfies the court that the plaintiff is desiring to enforce an agreement against the honesty of the case, they decline lending him their assistance, leaving him to prosecute his legal rights as he can. Here, I think, the plaintiff fails in the very foundation of his case, for he charges an agreement respecting lands, which he does not shew by legal evidence, and while it is shown on the contrary by writing that the agreement which was made was essentially different. It is not material to consider whether the charge in the bill of the plaintiff being induced to enter into the alleged agreement by a fraudulent misrepresentation, or concealment of facts, is supported by proof; because if no such agreement, as the plaintiff alleges, can be legally held to have been entered into, it becomes idle to enquire about the inducements to do that which was not done. In point of fact, however, I do not see that there is satisfactory evidence of such misrepresentation or concealment as is alleged, respecting the defendant's title to, and possession of, the one hundred and thirty acres. The bill does not charge that the defendant said he had seventy acres cleared, but only describes the tract as having in fact that proportion cleared; and as no such representation is in issue, the evidence of witnesses on that point signifies nothing; and besides, it is not proved how much of the land is

cleared. Looking at all the evidence, if the case turned upon a proof of such a fraudulent misrepresentation or concealment as is alleged, I cannot say that I should feel satisfied with the proof of it, so as to feel warranted in making the fraud charged the ground of a decree. For such a purpose, the evidence should be clear and conclusive; for fraud is not to be imputed to a man upon probabilities, or slight surmises, or upon a nice balancing of evidence.

There is a good deal in the accounts given by some of the witnesses, to throw suspicion on the defendant's conduct in this transaction. After reading the evidence, I am not satisfied that it was perfectly upright, and that he was open and candid; but it would not be enough to have doubts on that point; we should see some clear misrepresentation or some undoubted suppression of a material fact. Now here, as to the defendant representing that he had some valuable interest in the whole one hundred and thirty acres, there can be no reasonable doubt upon Bradley's evidence, nor indeed without it, that the elder Mr. Bown, who made the bargain, knew perfectly well what was the nature of the defendant's interest in these Indian lands, if it could be called an interest; there is nothing to fasten upon the defendant a precise allegation that the whole one hundred and thirty acres was held by him under the same circumstances, and with the same strength of claim from actual occupancy, so that he could transfer as good a claim in every part of it as he could in the cleared land. Mr. Bown's evidence, and Mr. Walter Bown's evidence, prove nothing more on this point than what is very probable, that he spoke of his deeds as covering one hundred and thirty acres, and so they did. The deeds were in the hands of the agent, and open to the inspection of the plaintiff; they explained the nature of the case fully. Mr. Bown expressed himself satisfied with them, and drew himself the deed, after reading them, which the defendant signed. I do not see what room there would be for the application of the doctrine *caveat emptor* in any case, if the purchaser with such deeds as those before him, and declaring himself satisfied with them, could complain afterwards, upon anything that is here shown by the plaintiff, of the interest not being such as he expected. In point of



fact, for all that is proved, the legal interest is the same in one part of the estate as in another ; and so far as actual cultivation and occupancy was necessary to strengthen what was a mere claim to the indulgent consideration of the government, the plaintiff and his agent, or his agent at least, must well have known that the one hundred and thirty acres were not all occupied and improved ; they lived near the property, saw it often, had every opportunity of viewing it, and they had its exact boundaries expressed in writing. As to the alleged misrepresentation by the defendant, that he was entitled to the possession, and was in fact in possession of the whole one hundred and thirty acres, it certainly is not found that he made any such statement ; and if by possession he meant actual visible enjoyment and use of the land, it would have been absurd in him to have made such a statement, for the parties with whom he was contracting knew that the fact was otherwise. Indeed, in the argument, the equity of the plaintiff's case was rested rather upon an imputed fraudulent suppression of the fact, that another person or other persons were in possession of parts of the one hundred and thirty acres adversely to the defendant's claim, than upon any actual misrepresentation made on that point. But as weak a part as any of the plaintiff's case, and perhaps the weakest, is that we are not shewn, nor is it even stated by the plaintiff in his bill, what other person was in possession of any definite portion of the one hundred and thirty-four acres, excluding him from that portion, nor the right or claim of such person to possession, nor whether he persisted in keeping the plaintiff out, nor whether he had the power to do so, nor whether the plaintiff had found that in consequence of such possession his claim to pre-emption in such portion of the land would not be recognized by the government, nor what disadvantage he had suffered or was likely to suffer by reason of the possession of any person. The plaintiff says he for the first time *learned* from Hanson, that defendant had only been in possession of thirty acres ; that he *ascertained* afterwards, that that information *was correct*, but that is no positive and direct affirmation that any other person *was in possession* of any particular part of the land ; and for all that is stated in the bill, and even for all

that is proved, there may be in fact no other person in possession of any considerable portion of the land upon such a claim as the government would prefer to that which the defendant had held ; or the plaintiff might, for all that he has stated or proved, find no one resolved to contest the possession with him in any part of the one hundred and thirty acres, if he were to go forward and assert his right. Surely the plaintiff should have charged and proved not merely that the defendant had not been *in possession* of all the one hundred and thirty acres, but that some other person to his knowledge was in actual possession, or had a better title of a certain part, which he maintained to the prejudice of the plaintiff. And yet if the plaintiff had made out a *prima facie* case of misrepresentation by his bill and evidence, Mr. Burwell's evidence, it appears to me, must destroy it, unless we take upon ourselves to discredit him, or unless we treat his testimony as inadmissible ; for he swears distinctly that before the bargain was concluded he made the plaintiff's agent fully aware of the very facts which he now complains of (so far indeed as he can be properly said to complain of any specific grievance), and that the agent admitted to him that the defendant had made him acquainted with it all before. Of course if his evidence is admitted and believed, it would make an end of the case upon the broad merits, and independently of all legal and technical objections. With regard to rejecting Mr. Burwell's account as incredible, I see nothing which would have justified the Vice-Chancellor in doing so. He knew perfectly well the nature of such matters as he was speaking of ; he had been employed by both parties in the course of these transactions, and he is not shewn to be connected with either, or to have any interest whatever on either side. It would certainly be strange if a court were to rescind the contract between these parties on the ground of fraud, in the face of all his clear and direct testimony under oath, showing that no such ground existed. How could the court arbitrarily look upon him as unworthy of belief, merely because the agent denies his statement, when no attempt was made to impeach his character. If the story he tells were hard to be believed, from its extreme improbability, that would furnish a ground ; but we can surely

have no difficulty in thinking it possible that the plaintiff would, with a full knowledge of all that he now complains of, make the bargain that he has made, when we find it proved that after all *he is receiving an annual rent of £37 10s. for the tavern and thirty-five acres, of which he was put in possession, and for which (if he made good no claim to any more land) he will pay £265.* A purchase that yields more than fourteen per cent interest on the cost, certainly raises on the face of it no evidence of a fraud upon the purchaser. We can very readily believe that the plaintiff, or any one, would willingly consent to close the bargain on the understanding that he was to be clearly in the possession of the tavern and thirty-five acres of inclosed land, and to take his chance (as the very deeds placed before him clearly shewed he must do,) of getting the rest of the one hundred and thirty-four acres; and it is remarkable, that while no witness gives any certain account of there being any more of the one hundred and thirty-four acres cleared and occupied than that which the defendant held, and which he delivered over into the plaintiff's possession, the defendant swears distinctly and positively that there is none. But it is contended that Mr. Burwell's evidence of his conversation with the plaintiff's agent, before the bargain was concluded, is not receivable. He was a witness for the defendant. The plaintiff relies on his evidence for the purpose of establishing that the defendant had not been in possession of all the one hundred and thirty-four acres, and that some one else had been long occupying a part. What he did say on that point is not satisfactory, and could not prevail alone over the distinct denial in the answer, that there was any improvement beyond the defendant's thirty-five acres; but I do not see that the plaintiff could be allowed to use his evidence for establishing *that* fact, and at the same time object that he could not be a witness at all, because he had not been called to speak to anything that was put in issue by the pleadings. But surely this part of Mr. Burwell's evidence does bear distinctly upon the main point in issue, viz: the alleged fraudulent misrepresentation; for if it be true that the agent, before he completed the purchase, acknowledged that the defendant had informed him accurately of the condition of the property,

what becomes of the fraudulent misrepresentation or concealment by which he charges he was imposed upon? It is hardly worth while to go minutely into these questions, for the plaintiff's case is in my opinion so wholly unsustainable. and on several distinct grounds, that it is unimportant to dispose of every doubtful point. If the plaintiff could have proved by legal evidence, and had proved, such a contract as he stated, and that the defendant had fraudulently misrepresented or concealed some specific facts; and if the true state of these facts had been stated in his bill, and proved by evidence; and if he had shewn that the fraud of which he complained was such in its effects that he could not have under his contract that which he was entitled to expect—still there would remain not merely the consideration, that for all that appeared he had made an exceedingly good bargain, and had got more than the worth of his money, but this more material consideration, that after he had discovered the true state of things according to his own admissions, so far from repudiating the contract on the ground of fraud, he has acted upon it, as if it were valid, has leased the property through his agent, and has received rent upon his lease, and at this moment uses and enjoys it as his own, not even shewing in that he had before done what he could to abandon it. We could not possibly hold that there is no consideration for the note which he has given, while he thus retains the possession of his purchase, and has done so for more than two years, receiving rent from a tenant, to whom he has made a lease since his knowledge of the alleged fraud. Upon this point I refer to the very strong case of *Campbell v. Fleming et al.*, 1 Ad. and Ell. 40; in that case the plaintiff had purchased some shares in a mining company, upon representations contained in printed advertisements, and which were grossly fraudulent, and the whole scheme was a deception; but after discovering the fraud he nevertheless disposed of some of the shares so as to realize a considerable sum of money. After he had done this, he discovered for the first time a new feature in the fraud, viz: that an outlay on the mines, which the vendors had stated to him amounted to £35,000, had not in fact amounted to £5000. In consequence of this he brought an action to recover back



his money, his counsel contending that as it was clear the transaction was a fraud *ab initio*, no contract could arise upon it; and that even admitting that the plaintiff could waive the fraud and adopt it as an existing contract, yet he was entitled to repudiate it on discovering a fraud of which he was before ignorant, and which he therefore could not be held to have waived. He was nonsuited at the trial, and the court all concurred in the propriety of the nonsuit. Littledale, J., said, no doubt there was at the first a gross fraud on the plaintiff, but after he had learned that an imposition had been practised upon him, he ought to have made his claim; instead of doing so, he goes on dealing with the shares. Parke, J., says, "after the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he lost his right of rescinding it." The fact of the discovery of a new fraud was a strong one, which does not exist in this case; but the court were unanimous in holding, that even that could not overcome the fact of the plaintiff having acted on the contract as valid, after discovering that he had been imposed upon. Patterson, J., meets the whole case in very explicit terms, and I think what he says applies with irresistible force to this plaintiff: "no contract," he says, "can arise out of a fraud, and an action brought upon a supposed contract which is shewn to have arisen from fraud, may be resisted. In this case the plaintiff has paid the money, and now demands it back on the ground of the money having been paid on a void transaction; to entitle him to do so, he should at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud, and it cannot revive the right of repudiation which has been once waived." It is impossible that we could treat as a repudiation of the whole contract, the arrangement which the plaintiff alleges, but has not sufficiently proved, that he was in treaty with the defendant's agent for converting the purchase into a transaction of a loan, which would have given the plaintiff about £35 a year

for the interest of £112 10s., a proposition which the defendant swears was not made to him, and which, according to what the plaintiff has shewn, was not professed to be grounded on any repudiation of the former contract as fraudulent. The evidence of the plaintiff having leased to one Leonard, by the year, the tavern and thirty-five acres, is given by Robert R. Bown himself, the plaintiff's witness and agent; and it is evidence that must, I think, be admissible under the pleadings, upon that part in this case which charges that in consequence of the fraud practised the plaintiff has no consideration for the note given by him. There was some points discussed in the argument connected with the evidence which I have not entered into, because they could not be material in my view of the case, but I have carefully considered all the evidence. It is in some points inconsistent, and it is in general very inconclusive; the facts upon which it would be necessary that the court should be precisely informed, are not brought out; and in my opinion it is not in any one essential point so satisfactory upon the merits as to have warranted a decree in the plaintiff's favor, if there had been no legal difficulties in the way occasioned by the rules of evidence. The principles which govern the administration of equity in cases of fraud, were correctly and forcibly stated by Mr. Blake on the part of the plaintiff, and were not contended against by the defendant. The question turns, as is commonly the case, upon their application to the facts. The position cannot be denied, that a person inveigled into a contract by a fraudulent misrepresentation is entitled to have it rescinded, and that although a vendor may not commit himself by any positive representation, yet his suppression or concealment of material facts within his knowledge is equally a fraud, and will equally invalidate the contract; but except in very plain cases, questions may arise depending upon the subject matter of the contract, the spirit in which the representation was made, as for instance, whether the seller was merely in general terms commending his article, as dealers commonly do in the course of their trade; whether the defect which has been discovered, was latent or patent, and if patent, whether the buyer had fair opportunity to inspect for him-

self, so that he could be treated as purchasing upon his own judgment; or whether he so clearly relied upon the statements of the seller, as to have acted wholly on that confidence, and so to have saved himself from the application of the maxim "*caveat emptor.*" In the case before us, besides discussing these points, it was thought essential to the plaintiff's case to urge, that if the defendant were found by the evidence to have made assertions to the plaintiff respecting the extent of his possession, such assertions, though made after the contract was completed, might supply evidence of deception before the contract, by affording a reasonable presumption of what the defendant had undertaken to convey; and further, that conversations preliminary to the contract, might furnish good evidence of what the sale made afterwards was intended to transfer; and that a wilful suppression of material facts bearing upon the value of the estate, in the course of such preliminary negotiations, would invalidate the contract, not on the ground of fraud intrinsic in the contract, but fraud extrinsic in the inducements which led to the contract. Admitting that the authorities cited on these points would justify us in carrying these positions to the full extent contended for, and even in the case of a contract carried into execution by a deed executed between the parties under all the circumstances found here, still I consider that this consequence only would follow, that the plaintiff was in a situation to shew a good case for equitable relief, by stating the contract truly as it stands in the deed; that is, that he had bought from the defendant "*the assignment or quit-claim from McDonald to Bradley, and from Bradley to defendant;*" in other words, the paper title transferred under the sheriff's sale (let that be what it might); that he had been led to buy such right or claim by the defendant's assurance that he was in actual possession of the one hundred and thirty-four acres; that the fact was, that at the time of such purchase made by him one——was in actual possession of a certain part, to wit, —— acres of the said one hundred and thirty-four acres, to the exclusion of the said defendant, and claiming adversely to him; and that although the defendant well knew that fact, yet he fraudulently concealed it from the plaintiff, and so induced him to

make the purchase in ignorance of the truth. Instead of this, however, he stated the contract (which we can only take from the deed) untruly, by asserting that he agreed to buy from the defendant *all his estate, right, interest, and possession of and in the land, &c.* If the Vice-Chancellor had thought fit to direct an issue at law, in order to ascertain what the defendant actually did sell; I conceive that the deed, and that alone, could have been legally received as evidence upon that point; and the rule applies equally in equity, when the deed was executed deliberately, and was even drawn by the vendee or his agent, with the prior titles in his hand, shewing what interest it was that the vendor could pretend to convey; and when no fraud is charged in the wording or execution of the deed itself, a court of law would undoubtedly say. We cannot hear verbal accounts from witnesses of what passed before the making of the deed, as to what one meant to buy or the other meant to sell; they may have had various intentions and various degrees of information as to their respective claims and expectations at different stages of the negotiations; but what they did at last settle down in, and what the one actually bought and the other sold, we can only learn from the deed; otherwise there would be no use or safety in written instruments. And it certainly is my impression that a plaintiff resting his case at law upon the assertion of such a contract, as the plaintiff has stated in the commencement of this bill, must on the production of the deed be nonsuited, for there can be no two things more distinct than selling all a man's right *to or under a certain paper title regarding* a term of twenty-one years in one hundred and thirty-four acres of land, and selling all a man's right, title, and possession *in the same land.*

To be sure, the fact may be, that the vendor may have no other right than under the paper title referred to, and in that case the transfer, as the deed states, would assign in effect all his right; but how that fact was we are not to conjecture or assume, and cannot learn it from parol evidence, in order to make the deed speak a wholly different language from what it does speak. I revert to this point in the case which I have before noticed, because it is in my opinion an



objection lying at the foundation of this case, which could not be got over, and which, as well as several of the other difficulties in the plaintiff's way, applies as much against the making a decree on the principle of compensation, as against a rescinding of the contract.

In my opinion the judgment of his Honour the Vice-Chancellor should be affirmed, and the appeal dismissed with costs.

The other members of the court concurring—

Judgment below affirmed, and the appeal dismissed with costs.

### IN THE EXECUTIVE COUNCIL.

(*Before the Hon. J. B. Robinson, Chief Justice; the Hon. Jonas Jones, Ex. C.; the Hon. L. P. Sherwood, Ex. C.; His Honour the Vice-Chancellor; and the Hon Mr. Justice McLean.*)

THE 8th, 18th, AND 22ND MARCH, 1845.

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

*Between* GEORGE STRANGE BOULTON ..... *Appellant.*

AND

ANDREW JEFFREY..... *Respondent.\**

Where the executive government have examined into and considered the claims of opposing parties to lands leased from the crown, with a claim of pre-emption, and have ultimately granted them to one of those parties, the Court of Chancery has not any authority, where no fraud appears in obtaining the grant, afterwards to declare the grantee of the crown a trustee of any portion of such lands for the opposing party, on the ground that he had previously acquired an equitable interest therein, And *quære*, if even there had been fraud, whether the court under such circumstances would have authority to interfere at the instance of the party.

*H. J. Boulton and Esten*, for appellant.

*Sullivan and Blake*, for respondent.

The facts of this case sufficiently appear in the opinion of—  
ROBINSON, C. J., who delivered the judgment of the court.

\* This case having been referred to in the judgment of the court in *Bown v. West*, I have obtained a copy of the judgment, and consider it may be useful now to publish it.

The question in this case has been ably argued at the bar, and if we could have brought ourselves to entertain any doubt after looking into the authorities cited, we should in justice to the parties, and because the question is really one of very extensive application, have taken whatever time was necessary for removing the doubt. It is (so far as we know) quite a novel attempt that is made by this bill, to establish that the grantee of the crown, holding under letters patent, may be declared by a court of equity to be but a trustee for another person, whom they may invest by their decree with the beneficial ownership of the estate, by reason of an equity which they may consider to have been acquired while the land was yet vested in the crown, and this when the grantee of the crown is not charged with having done or intended any thing wrong in obtaining the grant, but is admitted to have merely urged his claim to a patent on the footing of right, and when the government, exercising its judgment and discretion, on a full knowledge of all the circumstances, deliberately directed the patent to issue to the appellant; thereby disallowing the claim to a grant which has been advanced by the other party; in other words, that a court of equity may, upon its view of the claims of the parties on which the crown has decided, overrule the act of the crown, and defeat the title of the patentee, either partially as in this case, or wholly, as might on the same principle be done in other cases. We cannot derive any other impression on reading the opinion of the Attorney-General, which had been called for by the government, than that his advice to the government was, that Jeffrey had no claim either at law or in equity, to insist on a right to be allowed to purchase the acre in question, and that he ought not therefore to be permitted to stand in the way of the completion of the sale made to Grundy, which was insisted on by Grundy's assignee: nor do we think it can admit of doubt, that the government adopted this advice in the same spirit in which it was given, and meant to act fully in accordance with it. It would indeed be dishonouring the crown, to imagine, for a moment, that having made its patent to the purchaser after deliberately considering the conflicting claims, it could possibly be intended by the government to say to the grantee. We did

not pretend to decide the question of property in that which we sold to you; we have therefore only considered that we were granting to you the right to represent the legal estate, leaving Jeffrey to urge against you any claim to the land which he may have by reason of our previous acts, and those of our lessee, of which we have been fully informed, and upon which, though we have sold the land to you, and have received payment for it, we do not pretend to have determined.

It is difficult indeed to conceive a more prolific source of litigation than would be opened in this province, if the patentees of the crown were exposed to be attacked upon supposed equities acquired by other parties while the estate was vested in the crown, when no fraud, misrepresentation, or concealment is imputed to the patentee, and when the crown, at the time of making the grant, has exercised its discretion on a view of all the circumstances. Just such a patent as this is, lies at the root of every man's title; thousands of them have been issuing annually for nearly fifty years. It is impossible to tell in how many cases there may have been conflicting pretensions, which it was thrown upon the government to decide upon; in some no doubt, it has not been in their power to grant to either of one or more contending parties, without leaving some hardship to be borne by the other; the utmost care could not have avoided this in the infinite number of such transactions. The mistakes of parties, as well as of public officers, and misapprehensions of various kinds, have given rise to opposing claims which called for anxious deliberations in the executive government, and all that could be done at last, was to grant to the party which seemed to be best entitled. Now if it really could be held, that after such determination of the government, and after the letters patent had been issued by their order, the very party whose claims had been considered and overruled by them, could defeat the whole effect of their grant, by obtaining a decree in chancery declaring that the patentee of the crown held only in trust for him; it is easy to foresee the infinite vexation this would lead to, and the anxiety which must follow. Still, all that would be no argument against this bill, if upon principle it could be supported.

It would then be for the legislature, not for the court of justice, to deal with the inconvenience. *We agree however with the argument of Mr. Esten, that even if it could be charged that the patent had issued inprovidently, or that the crown had been in any manner misled, the consequence of that could in general only be, that upon a proper proceeding by the crown, at the instance (it might be) of the person shewing himself to be prejudiced by it, the grant shall be revealed, and thus the land would again be vested in the crown which unquestionable must be allowed to exercise its will in disposing of its property.* There would even then be no obligation upon the crown to issue letters patent to the plaintiff in this case; an obligation however, which this decree in effect imposes, and by anticipation enforces, by transferring the ownership to a person to whom the crown had expressly declined to grant the land. "If the land be granted to another, they shall be *"a scire facias* also against the patentee." (a)

Upon the other point of this case also, it appears to us the argument is conclusive in favour of the defendant. The two hundred acre lot in question was a clergy reserve; as such, at the time, it was leased for twenty-one years to Buck; it was subject to the provisions of a British act of parliament, 31 Geo. III., ch. 31, under which it might at any time be annexed by the crown as an endowment for a Protestant clergyman, to be held in fee. Buck therefore had no ground for reckoning upon any chance of purchasing, and he could transfer no claim of that kind, or to the benefit of the alleged clause of renewal, which was not at that time, but was afterwards inserted in leases of *crown reserves*, and not of *clergy reserves*. That clause affords but a slender foundation to build a claim upon, for with respect to this clergy reserve, the government did not give a right to purchase which could interfere with such disposition of the land as it might afterwards become necessary to make. At any rate the twenty-one years expired, Buck having some years before their expiration transferred to Jeffrey his interest in this one acre of the two hundred for the residue of his term, reserving a rent to be paid by Jeffrey of ten

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(a) Com. Dig. 2, Prerogative, D. 80.



shillings annually. Then not long after came the imperial statute, under which the colonial government was authorised and directed to make sale of clergy reserves. Jeffrey continued on his acre of land, a mere tenant at sufferance, so far as the crown was concerned, and having no other footing as regarded the crown for about six years. Then the government, on an application made to them by Grundy, contracted to sell to him this lot. Granting then, that the government had adopted, as a general rule, the equitable resolution to protect the former lessees in such cases as far as they might consistently with their public duty, still I am not prepared to say, that it is a reasonable or natural extension of such a rule, that the crown should be expected, still less that it should be compelled, to regard every sub-holder of their former lessee, of however minute a fraction of the lot, and at whatever distance of time after the expiration of the lease, as entitled to a pre-emptive right of his fraction. I should not have expected that the crown would agree to prejudice (as it might very materially do) the sale of the whole lot, by allowing a part of it to be held under a separate title; nor do I think, as regards the person who might have formerly leased the whole lot from the crown, and assigned his interest in a field, or in an acre of it, that such a principle would be just or reasonable in its application; in some cases it might be, in others not. But there it is in proof, that after this lease had run out, Jeffrey actually held as a tenant under Buttel, the assignee of Buck, and paid a yearly rent of £15; surely then he could not stand in the way of Buttel obtaining from the crown a right paramount to his in this one acre, for he acknowledged him as his landlord. But independently of the objections to his claim in reason, and independently also of the consideration, that it was for the crown to determine, as they did, conclusively upon his claim, this decree certainly deals more rigidly with regard to the supposed pre-emption right resting on such a foundation as is alleged here, and springing from the mere grace of the crown, than it would be right to do if the same privilege on no other foundation were claimed as having been conceded by a subject. I do not consider that Jeffrey's right to be admitted to purchase is made out conclusively, so that we

could found on it any decree in an ordinary case between subject and subject. Whatever his claim was, it was made known to the crown before any patent issued, and on a review and consideration of all the circumstances, the crown made the patent under which the appellant claims, and declined to grant to the respondent. There was no equity in Jeffrey as against the crown before the land was granted, and if any unfair conduct in the appellant, in obtaining the patent, would entitle a court of equity to decree a trust in favour of Jeffrey, arising out of transactions antecedent to the patent, yet no such misconduct was shewn. It is impossible to hold, that a man insisting openly upon his right, and taking what the crown gives him with a knowledge of all the facts, is guilty of fraud. That is not indeed pretended, and if a case of imposition on the crown had been made out, the only result of that would be, that the patent should be repealed, and the crown left to dispose of its land as it might find to be consistent with justice. Whereas, this decree makes the grantee of the crown a trustee for the plaintiff, although no fraud in obtaining the grant is alleged to have been practised by any one, and nothing is shewn that could upon any view of the case, be considered to give the Court of Chancery jurisdiction in equity to set aside the grant, and to decree, as is done here, that the patentee shall convey to the person whose interest the crown has refused to recognise.

*Per Cur.*—Decree reversed, and bill dismissed with costs.

## IN THE EXECUTIVE COUNCIL.

[Before the Hon. John B. Robinson, Chief Justice; the Hon. J. B. Macaulay, Ex.C.; and the Hon. James Jones, Ex. C.]

SEPTEMBER 3 & 4, 1846, AND JANUARY 4, 1847.

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR  
OF UPPER CANADA.

Between MARGARET BROWN, executrix of JOHN  
BROWN, deceased ..... Appellant.

AND

DAVID SMART, WILLIAM KINGSMILL and  
others ..... Respondents.

PRINCIPAL AND AGENT—PAYMENT—SPECIFIC  
PERFORMANCE.

A. authorised his agent to sell his estate for £500 *cash*, and the agent, instead of receiving *cash*, accepted bills from the vendee, drawn on his, the vendee's, agent in Europe, which bills the agent applied to his own use, by transmitting them to his correspondents, to whom he was largely indebted, and who placed the proceeds, when honoured, to his credit. *Held*: Reversing the decision of his Honour the Vice-Chancellor, that A. was not bound by such acts of his agent, that this was not a payment to A., and that until he received the amount of the purchase money in *cash*, he was not bound to execute a deed of the premises \*

*Sullivan and Vankoughnet*, for appellants.

*Blake and Esten*, for respondents.

The judgment of the court was delivered by—

ROBINSON, C. J.—Mr. John Brown was resident at Port Hope; Mr. Bethune, a merchant, was living a few miles distant, (at Cobourg) between whom and Brown there had been large transactions, involving purchases and sales of land, in which Bethune acted as agent for Brown, making bargains for him, and receiving the purchase money, as the evidence shews, though whether under a general authority, or by special instructions in each case, does not appear. They had also transactions together in bank paper, negotiated by Bethune for Brown's benefit, upon his own responsibility and Brown's. Brown owned a lot of land situated within a mile or two of his place of residence, on which he had a

\* See this case reported ante vol. 2, p. 172.

tenant, one Wilder. This farm the late Dr. Innes, who had recently arrived in this country, wished to buy, and he spoke to Mr. Brown, it appears, about it, who told him that his price was 650*l.*; he afterwards spoke to Bethune on the subject, and in consequence, Bethune writing to Brown in September, 1833, upon other matters of business, makes this communication and inquiry in his letter: "*I shall probably sell your Wilder lot, shall I take 500*l.* cash? let me know per bearer.*"

On the 16th Sept., 1833, Brown writes to Bethune on some other affair, and in relation to the question about the Wilder farm says, "The Wilder farm cost me more than 500*l.*, with the interest and expenses since I got it. As times are turning out, take that sum if you can do no better; I ought to get 650*l.* for it." Bethune closed a bargain for 500*l.* with Innes, who on 28th September, 1833, gave him two bills of exchange, each for 250*l.* sterling, one at three months, the other at four months, drawn by Innes on parties in Scotland, payable to Bethune or his order; which bills were immediately remitted by Bethune to his correspondent Bradbury, in Montreal, with instructions to send them to Scotland, and place the proceeds to Bethune's credit, he being then indebted to Bradbury in a much larger amount.

Bethune was at that time doing a large business, and was supposed to be perfectly solvent. In the winter of 1834 he was found to be insolvent, and it was then discovered, that his affairs had been in confusion for some time before this transaction.

The bills were duly honoured at maturity, and were placed by Bradbury to Bethune's credit.

In the spring of 1834, after Bethune's failure had occurred, and was publicly known, and after transactions of business between him and Brown had ceased, Innes became uneasy about his deed, which he had looked to Bethune for, and he pressed him on the subject. On 3rd April, 1834, in consequence of these communications which he had had with Bethune, he wrote to Mr Brown the following note—

"I received of Mr. Bethune the inclosed, of which retaining a copy, may I request you to send a written answer, as it is



“of some importance to have it in good time. The messenger is desired to remain for your leisure. Mr. Boulton wishes we could, as Mr. B. has returned home, soon meet and explain this matter, to me a very unpleasant one. I have not yet done about my bills being on Jamaica and dishonoured. (Signed) “ROBERT INNEL.”

(This last sentence I presume relates to some other matter.

Mr. Bethune's letter to Brown, which Innes referred to as being inclosed in his, and which he had evidently read and retained a copy of, is in these words ;

“Dr. Innes, who purchased the Wilder farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid, I shall account to you for the amount, 500*l*. *This transation is entirely out of our other business.* I sent the bills to Scotland though W. Bradbury & Co., and the moment they advise payment, I can draw for the amount, if you will make a title to the land, and leave it with Mr. Moffatt, to be given up on your order.”

This letter is signed by Mr. Bethune.

On the next day, Brown replies to Innes as follows:—

“Dear Sir,—I have your favour and inclosure from Mr. Bethune. In reply, I beg to say, that I cannot make a title to the lot you purchased until I get the pay, there being a mortgage due to Jonathan Walton, Esquire, of Schenectady, with interest, nearly 200*l*., which must be first discharged. At the time I consented to take 500*l*. for the lot, it was to be cash down ; and were it not that I was in great want of the needful, I would not have offered it for any such sum ; however, as the matter now stands, although much disappointed as I have been, at not getting the pay at the time I expected it, I will take no advantage by demanding a further sum than the 500*l*. with interest from the time you took possession from Wilder, although the rent I was getting much exceeded the interest. I hope it may not be long before the money comes to hand.”

Brown alludes in this note to Innes's having taken possession of the farm from Wilder. The evidence respecting

that is, that Innes, who had lately come to this country with his family, was advised by a friend to endeavour to get into possession of the farm at once, and thereby save the expense of going elsewhere with his family; that he applied for that purpose to Wilder, who was in possession, it seems, under a lease from Brown; but Wilder declined to go out unless Innes would consent to pay to Brown a small amount of rent then due; that Innes repeated this to Bethune, and it was settled between them that Innes should give an order on Bethune in Wilder's favour for the amount of rent, which he did, and Innes thereupon obtained possession, about the 10th October, 1833, and continued in possession. About the end of 1835, as I infer from the evidence, though the time is not precisely stated, Innes died, having made a will on the 2nd November of that year, devising to Eliza Innes, his wife, "all his property, mixed, freehold and real, in trust for her sole use, purpose and behoof, towards the education of his four children," who, with the widow and his executors Kingmill and Smart, are the respondents in this suit. The widow Eliza Innes remained in possession after his death, and in April, 1836, the executors paid to Jonathan Walton; the amount due upon the mortgage mentioned in Brown's letter to Innes, and took an assignment. One of the objects of the present suit was to compel Brown to repay to the estate the amount of that incumbrance; and Brown, on his part, filed a bill in 1839, for redemption against the executors. In 1836 or 1837, Innes having died without obtaining a title, and Bethune's affairs having in the meantime gone altogether to ruin, the executors of Innes brought an action against Brown in the King's Bench, to recover back the 500*l.* or damages for not conveying the land, and on 18th September, 1837, the cause was tried and a verdict rendered for the defendant upon the issues of non-assumpsit, and set-off pleaded. A new trial was moved for, and a rule to shew cause obtained, which after argument was discharged. In January, 1842, Brown died, having by his will devised all his property to his wife, Margaret Brown, and made her sole executrix. Before his death (December, 1841), the respondents had filed their bill against Brown, for specific performance of his alleged agreement to convey the estate to Dr.

Innes, relying upon the payment to Bethune as being payment to Brown through his agent, and praying that he might be compelled to make a title to Eliza Innes, the sole devisee of Robert Innes, the alleged purchaser, to which bill Brown appeared, but had not answered before he died. The suit has been revived against his executrix and sole devisee, the appellant, and upon her answers and evidence taken in the cause, his Honor the Vice-Chancellor, on the 8th of February, 1843, decreed a conveyance as prayed, and directed that the appellant should pay to the executors of Innes, from the assets of Brown's estate, the sum advanced by them to pay off Walton's mortgage.

This decree is appealed from.

I have given a mere outline of the leading facts, not stating various attendant circumstances on which the parties respectively have relied for sustaining or repelling the claim to the relief prayed. His Honor the Vice-Chancellor made his decree upon the grounds, that the contract of sale by Brown to Innes, was duly proved to have been entered into by Brown, through Mr. Bethune as his agent, and that the 500*l.* consideration money was duly paid as set forth in the bill, that is, paid to Bethune for Brown, he being the agent of Brown authorised to receive it.

In order to support the plaintiff's case, it is necessary to establish the following points, independently of the question of fact regarding the payment of the purchase money:—

First, That where a person who has contracted for the purchase of an estate dies, after paying his purchase money (assuming the payment for the present to be proved), and without having received a conveyance, the devisee of his real estate, under a will made after he had paid the purchase money, but which contains no specific devise of the land bargained for, may sue in equity for specific performance. Secondly, That there is proved in this case, by a note in writing sufficient under the Statute of Frauds, such a contract in substance as the plaintiffs (below) set out in their bill; or that independently of any writing, the plaintiffs proved such a contract as they set out in their bill, and proved also such circumstances of full performance on one side, or of part performance or otherwise, as take the case out of the Statute

of Frauds. Thirdly, That where in such a case as the present, the executors have sued at law to recover back the money on account of the land not being conveyed, or to recover damages for not conveying according to the alleged agreement, and have a verdict against them on a record which would have admitted of a recovery on either ground, such proceeding at law by the executors is no bar to the devisee suing in equity on the same contract.

With respect to the first point. I have no doubt that upon such a case as is stated in this bill, the devisee may sue in equity for a specific performance of the contract. There would be no remedy at law upon a mere agreement of this kind for the devisee, nor for the heir (if Dr. Innes had died intestate) whatever might be the case upon a covenant under seal, made by him with Innes and his heirs, to convey the land to him in fee (a).

But as regards the equitable remedy to compel a conveyance, it is no objection that the heir could not inherit nor the devisee take any legal estate in the property. In this case, if the purchase money can be held to have been paid to Brown, through his agent Mr. Belhune, it was paid in full not only before his death, but before his will was made, so that the case would not even require the aid of the statute of 4 Wm. IV. ch. 1, respecting after-acquired property. Innes must then be held to have had an equitable interest which he could devise, and which would pass under the general words used in this will, as well as if the particular interest had been specified. Brown would be looked upon in equity as holding in trust for the devisee, and could be compelled to convey, and the same remedies in equity would lie between the devisees or heirs of the respective parties as between themselves if they were living.

Upon the second point, I am of opinion (though it has not seemed to me to be quite clear of doubt), that there is evidence in writing, sufficient to satisfy the Statute of Frauds, of a contract by Brown to sell to Innes the Wilder farm for 500*l.* cash, which is in substance the contract set out. The

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(a) 4 B. C. C. 31; 10 Ves. 597, 614; 7 Ves. 265; Gilbert's R. 91; 1 B. & B. 265; Bac. Ab. Legacy and Devise, B.; 1 Sug. 371; 12 Ves. 107; Orme v. Broughton, 10 Bing. 533.



proof is only to be found in the letters. Brown's first note to Mr. Bethune constitutes no contract; it is a mere authority to accept anybody's offer to buy the estate for 500*l.* It made Mr. Bethune his agent for the purpose of entering into such a contract, not with Dr. Innes in particular, but with any one. This was written in September, 1833. Then when Mr. Bethune in April following writes to Mr. Brown, "Dr. Innes, who has purchased the Wilder farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid I shall account to you for the amount, 500*l.*," and adds in his note a request "that he will make a title, and leave it with a third party, to be given up on his (Brown's) order," he furnishes evidence, by a note or memorandum in writing, signed by his agent, that Brown has (through his agent) contracted to sell to Dr. Innes the Wilder farm for 500*l.*, for which a title is yet to be given; and to be given (we must infer) upon payment of the purchase money, since nothing is stipulated to the contrary. It is of no consequence that this letter is not addressed to Innes, but is merely a communication from the agent to his principal. When the authority of the agent is established, then a written note of what he has agreed to, signed by him, is all that the statute requires; for it is not the contract that is required to be in writing, but evidence of the contract. The terms of the contract sufficiently appear in the letters; that is, the description of the property, the price, the name of the vendee, and the interest to be conveyed (*b*). This point of the case, however, is subject to a doubt arising out of the question of fact which has given rise to the whole dispute. Did Mr. Bethune assume on his own account to sell to Innes, making the transaction expressly one of his own, or did he contract as agent for Brown? and does the note amount to evidence of anything more than what the appellant insists upon, namely, that Mr. Bethune, relying upon Brown's acquiescence, had taken upon himself to deal with Innes for the sale as if he and were his own, not contracting on behalf of Brown. It may, be said that the letter of Bethune to Brown (April, 1834), contains no statement inconsistent with that; and in truth it

(*b*) 1 Sug. 168-9; 3 Taunt. 172; 3 M. & K. 353; 3 V. & B. 187; 5 N. & Man. 260; 3 Atk. 503; 3 Mer. 441; 12 Ves. 107.

does not ; but when we find Brown agreeing to the sale at that specific price, both before and after the bargain was concluded, we cannot hold otherwise than that Innes would be at liberty to look to him for the fulfilment of the contract, though he might also have chosen to deal with Bethune as a principal in such a manner as to have a clear recourse upon him. And indeed, Brown's letter to Innes, written in April, expressly adopts the contract. "I cannot make a title (he " says) to the lot you purchased until *I get the pay.*" This is equivalent to an engagement to make a title when he does get his pay ; and it is a promise made directly from himself to Innes. There being then a sufficient note in writing of his agreement to convey the Wilder farm to Innes when he should receive the 5000*l.*, it is not necessary to discuss the point, whether the circumstances of Dr. Innes going into possession as he did, and being allowed to hold it, making considerable improvements, relying (as it is said on his purchase), could take the case out of the statute, if there had been no sufficient writing. Nor need we consider the effect of payment of the purchase money, which indeed could not be relied upon without anticipating the discussion upon the main question in the case, that is whether the purchase money can be considered as having been paid *to Brown* or not. The appellant's admissions of a parol contract in her answer, so far as they go, would not now I conceive be sufficient to establish the case in the absence of a writing, because she expressly sets up the statute as a bar.

Upon the third point, which is, whether the proceedings at law taken by Dr. Innes' executors form any impediment to the devisees, suing in equity, I trust we are right in assuming that they do not create a difficulty ; but I do not by any means accede to the arguments used on the part of the respondents on this point in the case, to their full extent. If Brown and Innes were still both living, and Innes had sued Brown in such an action as is set out in the record, which is in evidence in this case, his recovery of damages would of course have prevented his suing afterwards in equity to compel a conveyance : so I think would his failing to recover, by the jury giving a verdict against him upon such issues as involved proof of the contract, and led to a

trial upon the merits. It seemed to be assumed, that final judgment must be entered ; that a mere verdict is of no consequence, but that the civil action must be conducted to such a termination, as places upon record a judgment of a competent tribunal upon the merits. The language of the Lord Chancellor, in the case cited from 2 Mylne & Craig, 602, is certainly to that effect, and is very emphatic, but it must be considered in reference to the particular case, and can hardly have been intended to lay it down as a principle, that where a party has received an injury for which he may claim damages at law to the extent of a full compensation, or may sue in equity for a mere specific remedy, he may first drag the opposite party into a court of law, and at any time before or after verdict, so long as there is no judgment entered of record, may at his pleasure change his jurisdiction, abandon his action, and commence a suit in equity. If both parties were living, I conceive that Dr, Innes could not have abandoned his civil action after verdict against him, and filed a bill, without shewing some ground for the double proceeding that is not shewn on the pleadings before us. If he could not so proceed against Brown himself, he could no more proceed against his heir or devisee. Then as to the change of parties on the other side, it has this effect no doubt, that by Dr. Innes's death, his interests as to the reality and personalty are in different hands. His executors, in the action which they did in fact bring, could I have no doubt have recovered back the purchase money which Innes had paid, or could have recovered what a jury might think it reasonable to give for breach of the agreement to convey, if in the opinion of the court and jury they had proved such a case as they declared upon. The contract was broken in the time of the testator, if broken at all ; he therefore had a full and perfect right to recover all the damages occasioned by the breach of that contract. Neither his heir nor devisee could sue at law upon the breach of such an agreement ; their remedy would be in equity only (c). If the executor had recovered in the action at law, it would have prevented the devisee suing afterwards in equity, for clearly the vendor or his representative could not be compelled to make a double satisfaction

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(c) 1 Sug. 371.

for the breach of the one agreement. The remedy of the devisee of Dr. Innes, would in that case as I consider be against his executors, to compel them by a suit in equity to lay out the sum which they might have recovered in the purchase of other real estate for the devisee. I do not mean that the language of the courts has been always decisive and consistent in favor of the executor recovering upon such an agreement, a full recompense for the breach of covenant, as his testator could have done, but I take that to be the effect of the decisions, and I cannot reconcile the language of the judges in the case of *Orme v. Broughton*, 10 Bing. 533, with the supposition that they took any other view of the law. Then if a recovery at law by the executors would have prevented the devisee from suing in equity to compel a conveyance, their failure to recover would in my opinion have the same effect, if the pleadings in the action at law opened to the jury the whole case upon its merits, so that the plaintiffs must have recovered if they had proved the contract alleged, and if the result so far as the case had gone was adverse to their recovering on the merits; otherwise the same object of litigation might be pursued in two tribunals, both equally competent to charge the defendant, though not both competent to give the same remedy to the same plaintiffs. I do not understand that the question depends upon that, nor upon the fact of the party succeeding or failing. If it does, there would seem to be no meaning in all that is said about parties not being allowed to change their jurisdiction after a tribunal has been resorted to which can entertain the case, though not precisely in the same shape. No doubt, so far as the principle rests upon the election of remedies being binding, it is to be considered that it was the executors here that proceeded at law, and that it is *their* election which is attempted to be made conclusive upon the devisee, who stands on a different interest. Still the question remains, whether the other party can be allowed to be prejudiced by the circumstance of Innes's death having placed his real and personal estates and interests in different hands. So far as his estate is concerned, it would seem reasonable to hold that it should not be in the



power of those representing him in different respects to pursue separate remedies for the same injury, any more than he could have done it while living. If a court of equity would in such a case, at the instance of the devisee, restrain the executors from proceeding at law for damages, in order that the estate might be obtained in equity, in a suit for specific performance, that would seem to be the proper course. But it is material to consider, that we had not in this province at that time any court of equity to resort to, and that the devisee was on that account perfectly helpless. Whatever effect therefore it might seem proper to give to the fact of the executors having sued at law under other circumstances, it would seem very unreasonable and unjust to hold the devisee, precluded by the abortive attempt of the executors to recover damages, while she had no tribunal open to her in which she could sue, though if the executors had recovered a recompense in damages, that must (as I suppose), have put an end to all further proceedings against Brown's estate on the agreement.

There are other considerations connected with this branch of the case, which I will not now dwell upon, because our ultimate decision will not turn upon them. If it did, indeed, I should feel it necessary to pursue the subject much further, for I have not arrived at a clear conclusion upon it. It may be that it ought to have been shown in this suit, that the failure to recover at law was not upon some ground arising from defects in the system of proceeding at law, or it may be that the executors failing at law upon grounds which would be equally conclusive in equity, should be no impediment whatever to the devisee afterwards pursuing her remedy in equity, and it would at any rate be right to hold this until we can see the contrary very clearly established upon authority.

At present I assume that the agreement is legally proved as charged in the bill, that is, that Brown engaged to convey the land on being paid 500*l.* in cash, that the devisee has this remedy upon it, and that she is not precluded from pursuing it by the attempt which the executors of Dr. Innes have made, and failed in, to recover damages at law; and as the case is one of considerable hardship, it is more

satisfactory to be able thus to dispose of it on a view of its substantial merits.

All that remains to be determined then is, whether Mr. Brown can be properly held to have broken his contract, or rather, whether the devisee of Dr. Innes is now in such a position that she can call on Brown's representative to perform it.

We have considered the evidence as carefully as we are able, in all its bearings and are compelled to say, that in our opinions Brown is not chargeable with a breach of his contract, for that the condition has not been performed on which he undertook to convey ; *he has not been paid the 500l.*

The devisee (of Innes) contends, that Mr. Bethune was *really* the agent of Brown for receiving the money, as well as for finding a purchaser ; that upon the supposition that he was so, Dr. Innes paid him by placing bills in his hands which produced the amount ; that although Brown named 500l. as his *cash* price, and though the bills at three or four months, not yet presented, were not cash, yet they were accepted by Brown's agent, and with the knowledge of Brown, as a compliance with the terms which Brown had exacted, provided they should be paid at maturity ; that is, the delay was not objected to. She contends further, that the understanding and expectation of Brown was that the bills were to be negotiated through Mr. Bethune, and the money pass into his hands ; that therefore when the money did pass into his hands, it was in fact and legal effect a payment to Brown, and entitled Dr. Innes to call for his deed.

She insists further, that this view of the case is strengthened by the facts, that Bethune and Brown had up to that time and at that time, large unsettled transactions together, and connections in business of so intimate a nature, that payment to one, on account of the other, of an amount like that in question, upon similar transactions, might be implied from the accounts given in evidence to have been a matter of ordinary occurrence, which neither would think of objecting to ; that the nature of their dealings in regard to mutual accommodation in banking paper, would naturally account for their business being upon such a footing, that the actual

state of their accounts at that time did either in fact warrant Mr. Bethune in taking credit to himself for the proceeds of these bills on Brown's account, or that both parties might well have supposed it did, and might therefore, for the time at least, without impropriety on the one side or dissatisfaction on the other, have been content to have the matter rest on that footing ; that when the bills were given, Mr. Bethune was looked upon by every one as perfectly solvent, and Brown's confidence in him was unlimited; that there is therefore in all the circumstances no reason to doubt, but on the contrary good reason to infer, that Brown did understand and intend when the bills were taken, that Mr. Bethune should negotiate them and receive the proceeds, and should credit the sum to him in account, and that as soon as it should be known that the bills thus negotiated were actually paid, it should be considered that the 500*l.* were paid within the condition of the bargain which Mr. Bethune was authorised to make, so that Innes might then call for his deed.

There can be no doubt, if this be so, the consequence would follow, that the money being paid upon the bills in good faith to Mr. Bethune, before his insolvency was known, or paid to any one to whom he had transferred them for value in the way of business, would be a good payment to Brown, and would entitle Dr. Innes to demand a conveyance

Mr. Bethune's evidence in his dispositions, goes far to support such a case, but not to the full extent, for even in these depositions he admits that " Dr Innes often stated *that he looked to him (Bethune) for the farm or the money, and " would have nothing to do with Mr. Brown*"; and it is but just to the appellant to consider, that what Mr. Bethune states in his evidence, taken upon commission after he had left this province, seems wholly at variance, not only with the testimony of the two Messrs. Owston, but with the written statements of the transaction made by Mr. Bethune himself, in his note written at the time, and written too for the purpose of governing the conduct both of Brown and Innes, in their communications with each other upon this very matter. It seems inconsistent also with the declarations and conduct of Dr. Innes himself.

It is to be borne in mind, that the bills being transmitted from Montreal on the 10th October, and payable at three and four months respectively after sight, it was not known (as I suppose) at Cobourg, while the communications were going on, in April, 1834, whether they had been actually paid or not, though it seems that it was known they were accepted.

Mr. Bethune's affairs, no doubt, were in an embarrassed and confused state in April, 1834, while these communications about the title were passing; but whether that was generally known in Cobourg or not, at that moment, and whether it was known to Brown in particular, does not certainly appear. I infer from the statements in the evidence, that it was probably known to Brown in April, 1834, that Mr. Bethune's affairs were embarrassed, and that their mutual transactions had ceased before that time.

Bearing these things in mind, we must now look at the appellant's case.

Brown's written instruction to Bethune is, to sell the farm *for 500*l.* cash*. What that means there can be no doubt, and we can admit no parol evidence of a different agreement; but it is not contended that the meaning was, that the bargain was to be instantly consummated by payment of the money, but only that when it was to be consummated, (which Brown would allow a reasonable time for) it should be a cash transaction. Brown admitted that he was willing to wait till Dr. Innes could procure his money, by negotiating his bills through Mr. Bethune or in any other manner, but that what he stipulated for and never departed from was, that he would give no deed till he actually got the money; that he had merely authorised Mr. Bethune to close with any offer of cash, at 500*l.*

The evidence seems irresistibly to lead to the conviction, that Innes on his part was resolved to deal exclusively with Mr. Bethune, and not to connect himself in any measure or degree with Brown. He would pay Bethune the money, and look to him for the deed, and to no one else, satisfied that he could procure it for him, and that if he could not, he was honourable and responsible; and that he would therefore be ultimately safe in his hands. One cannot pursue the



evidence without being satisfied that it would not on any account have placed his bills in Brown's hands, though he knew (as I suppose) in September, 1833, that the land was Brown's and the deed must come from him.

Mr. Bethune, on his part, seems not to have hesitated to close the bargain with Dr. Innes, as if the land were his own and not Brown's; I do not mean that he misrepresented the state of the title, or that Innes did not know it, but that he was willing to deal on that footing; to sell the land as he would have sold a lot of his own, making himself responsible for the title, and to account to Brown (as no doubt he meant to do,) for the proceeds. Accordingly, though Brown wanted cash, as he says, and therefore those sterling bills might have answered to him, as well as to Mr. Bethune, the valuable purpose of supporting credit by making a conditional remittance, and though he lived nearer to Dr. Innes, it seems, than Mr. Bethune did, yet the bills, were drawn not in Brown's favour, but in Mr. Bethune's; they did not pass into Brown's hands, but were immediately sent by Mr. Bethune to his correspondent in Montreal, with directions to credit them to his account. "These bills," (he says to his correspondent and creditor, for he was then largely indebted to Bradbury) "*are taken in payment of land. The gentleman came well recommended. You will of course forward them,*" &c.

This is just what he would write of a transaction of his own, and if it had been true, as stated in the bill but not proved, that at that time the balance in account with Brown was much in Bethune's favour; or if Bethune believed that, which we must suppose from his evidence he did, one can well understand that he would make just such a communication, if having Brown's permission to sell the farm for 500*l*, he resolved to act as if the sale were on his own account, holding himself accountable, as of course he would be, to Brown for the proceeds. All this would have been well enough, and would have led to no loss in any quarter, if Bethune had remained solvent; but the money being lost in his hands, from his inability to replace it after he had diverted it to the payment of his own debt to Bradbury, it becomes due, in justice to the other party, to scan the nature

of the transaction scrupulously ; not by what Mr. Bethune may have intended to do, but by what Brown contemplated and agreed to.

It is reasonable to suppose that Brown knew that Mr. Bethune had found a purchaser in Dr. Innes, and that he had received bills from him ; and that he was content to wait for a few months in the expectation of receiving the money, either from Dr. Innes or from Mr. Bethune (it would matter not which,) and it is not inconsistent with the appellant's account of the matter, that in the meantime he should offer no opposition to Dr. Innes' going into possession, upon any compromise which he could make with Wilder the tenant.

That Dr. Innes took possession in consequence of his intended purchase, and would not have done so but for that, and that Mr. Brown so understood the matter, I have no doubt ; so also that Dr. Innes should make improvements on the place, which he would not have done but for his purchase ; and that Brown must have thought so, it is most reasonable to infer ; but it seems to me that there circumstances are of no importance either way. Dr. Innes felt confident that his bills would be paid, as they were ; and it is plain that nothing was further from his mind, than any distrust of his money in that case finding its way to Mr. Brown. On the other hand, Brown might naturally take it for granted that Dr. Innes knew his own prospects of getting the money ; that he well understood, that without the money he could get no title, and that he therefore acted at his own risk. Brown was secure so long as he held the title, and he had no motive for warning or prohibiting Dr. Innes from doing anything that he was doing, or for offending his proposed purchaser by intimating any distrust.

Then in April, 1834, while, for all that appears (though I am not sure the fact was so), the actual payment of the bill in England might not have been known in this country, we find Dr. Innes pressing Mr. Bethune for his deed. If he did not then know that the bills were paid, he was pressing for his title prematurely ; and his anxiety probably arose from rumours of Mr. Bethune's difficulties, and upon this occasion it is that Mr. Bethune, for the first time, for all that appears (except as he states in his own depositions), informs Mr.

Brown how the transaction really stood, in the hope of inducing Brown to make the title without receiving the money.

His letter bears strong marks of it being his first communication to Brown of his transaction with Innes about the bills ; he impliedly admits in it, that he cannot insist on a title being made, because the money was not paid, but he suggests that a deed may be made and deposited with a third party subject to Brown's order, which could only be to quiet Dr. Innes's anxiety for the time. He does not then tell Brown that he had made use of the bills as remittance ; he does not pretend that Brown had authorised him to receive the money on his account, but says *he can draw for it* (to pay over to Brown) as soon as he hears that the bills are paid. He does not pretend that he gave Brown credit for the money in the accounts between them ; or that he meant to expressly in his note, "*this transaction is intirely out of our do so, or was at liberty to do so ; but on the contrary says "other business,"*" thereby holding out to him the certain prospect, if the bills should be paid, of the actual 500*l.* going into Brown's hands, just as much as if Dr. Innes had sent his bills through any other channel.

All this is consistent with the appellant's account of the transactions, though very inconsistent with Mr. Bethune's statement made long afterwards, when he had failed in business, and when he must have been aware, that the effect of his having converted the bills to his own purposes must have been to throw the loss of the whole money upon Dr. Innes, who had trusted him so implicitly and would trust no one else, unless the transaction could be so treated as to make Brown bound by the payment. Such a reflection must, I have no doubt, have been very painful aggravation, to Mr. Bethune, of the misfortune he had fallen into. That it could have induced him to state under his oath anything contrary to his clear recollection of the facts, we should not allow ourselves to suppose, but it is due to justice to consider, that this note contained his statement of the facts of transactions while they were recent, a statement too, deliberately made in writing, for the purpose of inducing Brown to act upon it ; and what gives it great additional weight,

and was justly relied upon in the argument as having that effect, is, that Dr. Innes, by taking this note himself to Brown, which he had read and found no fault with, impliedly confirmed Bethune's account of the transaction. If he then conceived from anything Mr. Bethune had formerly stated to him, that when the bills were paid, Brown would be paid, whether he ever saw the money or not, why did he not say that there could be no occasion to wait till Mr. Bethune could draw for the money upon his agent in England, for that payment to Mr. Bethune's agent there would be a compliance with his contract, whatever might become afterwards of the money?

If the letter he was carrying from Bethune to Brown, should not naturally have led to this remonstrance on his part, Brown's answer to his own note surely must, for Brown there assured him in plain and positive terms, that there should be no deed made till he got the money; and he gave as a reason why he had always insisted upon this, that he had a mortgage on the land to pay off, and must have the money to do it with.

Now if it were clearly shewn that Innes did in truth only deal with Bethune as Brown's agent, that Bethune was authorised by Brown not merely to take the offer but to take the money (which I do not take to be the obvious construction of his note of April, 1833), then of course Innes's situation could not be prejudiced by any misapplication which Bethune might make of the money after receiving it, so long as Innes himself acted in perfect good faith, as I have no doubt he did; but the difficulty of the case consists in this, that Brown seems to have done all a man could do to preserve his land till he should actually get his money; that the written documents shewed he acted in that spirit; that Mr. Bethune's own written account of it, and Mr. Innes' conduct and admissions, confirm it, and produce a preponderance of evidence strongly in favour of the appellant's case, even without the aid of the very circumstantial and conclusive testimony of the witness Owston, whose evidence is not in any manner impeached or shaken.

To these circumstances it is to be added, that in the accounts rendered by Mr. Bethune during this period, and



extending to the close of his transactions with Brown, he made no mention of these bills ; that it now turns out that in 1835, upon a settlement of accounts with Brown, he discovered himself to be more than 2000*l.* in his debt ; that at the time of the bargain being made he was in his debt a small sum, and that it is not proved, as is alleged in the bill, that he applied the 500*l.* in making good any liabilities which he had assumed for Brown ; but clearly otherwise. And it is further material to remember, that the bills which Dr. Innes had placed in Bethune's hands were not for the amount of the purchase money only, but were for 500*l.* sterling ; which would produce, with premium on exchange, I suppose, nearly 100*l.* more ; and that Mr. Bethune was to place the overplus to Dr. Innes's credit in the bank for which he was agent. The whole case seems to lead to the conviction, that Dr. Innes confined his transaction to Mr. Bethune expressly and designedly, and made him his own agent to receive his money and pay it to Brown, and to procure his deed, instead of dealing with him as Brown's agent, and paying him the 500*l.* sterling in that capacity. If Bethune had continued solvent and Brown had become bankrupt, and his real estate passed into the hands of assignees ; and if Dr. Innes having negotiated his bills through some other channel had paid his 500*l.* sterling in cash into Bethune's hands, and it had been accidentally consumed there by fire, he would have thought it (I doubt not) most strange and unreasonable, that he should be told that his money was virtually in Brown's hands, and that he could look only to him.

The evidence seems to place the case on grounds, to which Lord Ellenborough's language in *Parnter v. Gaitskill* (a), strongly applies, " the money appears to have been paid by " the plaintiff upon his own confidence in the agent employed, and having trusted him, without any fault in the " defendant to induce that confidence, he must stand to the " loss, and is not entitled to recover it against the defendant."

If this be the correct view to take of the transaction, it must as decidedly prevent a court of equity from decreeing

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(a) 13 E. R. 438.

a specific performance of the contract, or rather from decreeing a conveyance, as it should prevent the party from receiving damages at law for an alleged breach of the contract. It is with much reluctance that we have come to the conclusion upon the case which I have expressed, because although, looking merely at the amount, it would be as great a hardship that the one estate should lose the land by being compelled to convey it without an equivalent, as that the other should loose the money with which the land was intended to be purchased, yet there is reason to fear that the loss must press much more heavily (if not distressingly), upon the one party than it would upon the other, and because the loss has occurred partly through the misfortunes and partly through the irregularity of one in whom Brown had long been reposing as it appears especial confidence, and who was much better known to him than to Dr. Innes. And again, when we see the nature of the accounts between these parties, the multitude of their transactions respecting lands, the freedom with which large credits were passed by Bethune to Brown upon similar transactions, and when we consider the estimation in which Mr. Bethune is admitted to have stood, both in regard to character and means, we cannot feel sure, if Mr. Bethune had for any purpose desired to let the 500*l.*, when paid, pass into their current account, that Brown would at any time have objected; and we cannot, after all, be certain that that was not the understanding between them in regard to this particular transaction. If it were so, that would put an end to the question; but looking only at what is proved in the case before us, we are bound to say, that the evidence shows almost conclusively, that the transaction was one of a different kind; and it is a principle in equity, that unless the case is free from difficulty and doubt, specific performance should not be decreed, but the parties should be left to such remedies as the law will give them.

We have thought of the propriety of directing an issue in order to take the opinion of a jury upon the question of payment, but it is in so great a measure a question of law arising upon the conduct and statements of parties evidenced by writing, and not capable, for any thing that is suggested,

of having additional light thrown upon it by further proofs in the power of either party, that we should hesitate about the propriety of such a course, since it could not be satisfactory to adopt the conclusion of a jury at variance with the written statements, which so far as they go should be their guide, as well as ours. And there is besides the fact well known to ourselves, as well as to the parties, that the opinion of a jury has already more than once been given upon the very question upon which the case now turns, namely, whether Mr. Bethune received the money as the agent of Innes or of Brown ?

It was noticed indeed upon the argument of this appeal, that in consequence of the discussions to which the verdicts alluded to, have given rise in the Court of King's Bench, the case does not come as a new one before us, when we are called upon to review the decision of his Honour the Vice-Chancellor. We wish it had been otherwise, for it is very natural that one of the parties should consider it a disadvantage. The circumstances, however, which occasions it, is one over which we have no control. When the legislature thought fit to make the common law judges members of a court for hearing appeal cases which had been decided in chancery, they made it their duty to pronounce the best judgment they can form upon whatever cases the parties may bring before them.

The changes in the political arrangements of the government, which have since removed to a great distance almost all those members of the court of appeals with whom it was intended we should be associated, must have the effect, while things remain on this footing, of placing us now and then in a situation where we must decide upon questions which in some other shape have been already before us, and perhaps between the same parties, and upon the same facts. If this previous judicial acquaintance with a case be a disadvantage, the party in whose favour his Honor the Vice-Chancellor has decided, may be at least assured, that if we could have found ourselves warranted by the course of equity proceedings, in disposing of the case in a manner more favorable to her than the common law had seemed to us to allow, we have had every inclination to give her the full benefit of the dif-

ference. If we have failed, as is very possible, in arriving at the correct conclusion, it is some satisfaction to reflect that there is still a course open, though unfortunately an expensive one, for obtaining in a higher court the judgment of minds far more experienced, and not possessed with any previous opinions upon the facts submitted to them.

The result of our judgment is, that the decree is reversed, and the bill dismissed with costs.

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### IN THE EXECUTIVE COUNCIL.

[*Before the Hon. J. B. Robinson, Chief Justice; the Hon. J. B. Macaulay, Ex.C.; the Hon. Jonas Jones, Ex. C.; the Hon. H. J. Boulton, Ex. C.; His Honour the Vice-Chancellor; and the Hon. Mr. Justice McLean.*]

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THE 13TH AND 27TH MARCH, 1847.

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ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR  
OF UPPER CANADA.

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*Between* ISABELLA BABY ..... *Appellant.*

AND

COLIN MILLER AND JANE MILLER his  
wife, DAVID J. SMITH AND Others,  
Executors of HUGH EARL, deceased. *Respondents.*

WILL, CONSTRUCTION OF—CUMULATIVE LEGACIES—CHARGE.

A testator, by his will, gave the residue of his real and personal property to his daughter, the lands to be held by her in fee tail; and in a subsequent part of the will adds, "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. Baby, at Hamilton." By a codicil, executed on the same day as the will, after making certain alterations in his will, he adds, "And I do hereby devise to my niece, Mrs. Baby, of Hamilton, the lot containing one-fifth of an acre fronting on School street, in the town of Kingston." *Held*, first, affirming the decision of his Honour the Vice-Chancellor, that the words "I wish and desire" were not precatory merely, but directory, and formed a



charge upon the residuary estate; and *Held*, secondly, reversing the judgment of his Honour, that the devise, in the codicil, of the town-lot in Kingston, was cumulative and not substitutional.

*Mowat and Vankoughnet*, for the appellant.

*Blake and Galt*, for the respondents.

ROBINSON, C. J. — Hugh Earl, Esq., on the 17th of January, 1841, made his will, as follows:

“First, I give and bequeath to my beloved daughter  
“Jane, all the personal property which I now own.”

“Secondly, I give, devise and bequeath to my said  
“daughter, all the real property of which I shall die pos-  
“sessed, to hold to her during her natural life, and to the  
“heirs of her body lawfully begotten, excepting the devises  
“hereinafter contained.”

He then devises the remainder over, in default of issue of his said daughter, to two of his nephews, William Beggs of Whitby in this province, and Charles Beggs of Dunkirk in the United States, to James Hamilton Blane and John Earl Blane of Dundee in Scotland, and his nieces Jane Douglas Blane and her sister, if then living, and to the children of his late sister Margaret, and to the heirs of their bodies as tenants in common. He then devises to his niece Sarah, then living with him, a certain town lot in Kingston in tail, and directs his executors to rent the same for her benefit.

He gives and bequeaths to his niece Margaret, then in New Brunswick, the sum of 12*l.* per annum, to be paid out of the rent of a farm of his in New Brunswick.

He then adds, “*I wish and desire that my daughter shall make a competent provision for my niece Mrs. Baby at Hamilton.*”

He devises to his nephew William Beggs, some land in Whitby in fee simple.

He gives to his niece Sarah, the interest accruing due on a certain promissory note, to be paid to her half-yearly during her life.

He makes specific bequests of certain articles of small value away to other personal friends, and appoints D. J. Smith, John R. Forsyth and Charles Stuart, Esquires, his executors.

On the same day and in the presence of the same witnesses, he executed a codicil in these words, "whereas I Hugh Earl of, &c., have this day made my last will and testament in writing, (now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof.) I do hereby give and bequeath to my niece Sarah, in addition to the bequests contained in my said will, the sum of fifteen pounds currency per annum, to be paid to her half yearly from and out of the rents of the property which I now own, and it is my desire that my said niece Sarah and Mr. Robertson shall remain in my house till my daughter arrives from Europe."

He then on the same day executes a second codicil in these words, "whereas I Hugh Earl of, &c., have this day made my last will and testament in writing, and have also made a codicil thereto, and whereas I have in my said will devised certain property to James Hamilton Blane, John Earl Blane, Jame Douglas Blane and her sister, and the children of my late sister Margaret, now I the said Hugh Earl, being desirous of altering my said will in respect of the said devises, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will and taken as a part thereof, and I do hereby revoke the said devises by my said will given to the above mentioned persons, and to the heirs of their body, and I do also hereby revoke the devise in the said will contained to Charles Beggs and the heirs of his body, and I do hereby devise all my real property, in case of the decease of my daughter without lawful heirs, to William Beggs of the township of Whitby, and to the heirs of his body for ever; and I do hereby devise to my niece Mrs. Baby of Hamilton, the lot containing one-fifth, of an acre fronting on School-street, in the town of Kingston, and opposite to the lot devised in my said will to my niece Sarah, the said lots being numbered 240 and 241 respectively, to hold to her and the heirs of her body for ever. And I do hereby direct that all my debts and funeral expenses be paid as soon after my decease as possible, out of the first monies that shall come into the hands of my executors from any portion of my estate."

This latter codicil is not executed in the presence of all the same witnesses as the other; both are attested in these words, "signed, &c., and declared by the said Hugh Earl " as and for a codicil to be added to and considered part to " his last will and testament, in the presence of us," &c.

Mrs. Baby, the appellant in this suit, who is a widow, filed her bill against the respondents, praying that a competent provision be decreed to be made to her out of the property, real and personal, devised and bequeathed by the will to Jane Miller, the testator's daughter.

The respondents put in their answer, in which they admitted that the testator died possessed of personal property of the value of 275*l.*, and of real estate of the value of about 2000*l.* But they submit to the court, that the devise in the will of a competent provision to be made to the appellant, is in effect revoked by the second codicil, which devises to the appellant a specific portion of the testator's real estate, which would otherwise under the will have gone to the respondent Jane Miller, and out of which, together with the personal estate, the competent provision was to have been made.

His Honour the Vice-Chancellor took that view of the effect of the codicil, and dismissed the bill with costs, but the cause being afterwards reheard upon petition, his Honour reversed that part of the decree which regarded costs, and ordered that the bill should stand dismissed without costs to either party, the appellant paying to respondents the costs of the rehearing.

The decree of the Vice-Chancellor is appealed from.

We must first consider how the case would stand upon the will alone, if there had been no codicil; it was contended in the argument before us, that even in that case the court could not rightly have decreed a provision to the appellant; that the words "wish and desire" amounted to a mere recommendation to the discretionary bounty of the daughter; that in the language of many cases on this subject they were merely precatory, and not binding on the devisee of the residuary estate, and furnished therefore, no ground for a compulsory decree.

Secondly, That such a direction could not be carried into

effect on the footing of a trust binding on the devisee, because it was wholly uncertain what would constitute a competent provision, and there was nothing definite for the court to act upon. On this part of the case his Honour's opinion was in favour of the appellant, and we think rightly. I do not indeed imagine that the respondents had much expectation of leading us to a different conclusion on that point. The cases which bear upon it are very numerous, most of them were cited, and after an examination and a comparison with the terms of the will, we have no doubt that we must hold the words "wish and desire," when thus used by a person having a right to control. to be equivalent to a direction, unaccompanied as they are by any words tending to limit the expression to a mere recommendation to the daughter's favor, and leaving her to make a provision or not according to circumstances which she was to judge of, such as the behaviour and merits of the party; the claim of others, &c. It is upon such qualifications of the devise expressed by the testator, that the doubts in such cases have turned, and then the courts could not but feel that if they were to make a compulsory decree, they would be contravening the will of the testator, by assuming a discretion which he had reposed in other hands. There is nothing of the kind here; it is true that Mr. Jarmin, in his Treatise on Wills, considers as other authors do who have written recently on the subject, that the tendency of the courts in the present day is to refuse to give effect to this kind of language in wills as sufficient to create a trust; but I cannot say that when we examine the decisions they refer to as evidences of this inclination, there is any clear appearance of a change in the doctrine and practice of the court. Any cases in which the courts have refused to recognize a trust as created by a will of this description, are cases which it can scarcely be supposed would have been at any time otherwise decided, and certainly they are not cases which could with any propriety be allowed to govern the present, being substantially different in their circumstances.

If the testator had, instead of "a competent provision," inserted a sum of money or an annuity, leaving all the other words in that clause of the will the same, no one could doubt



that his *wish* and *desire* that the devisee of his real and personal estate should pay his niece such sum of money, would have bound her if she took the estate. I take it to be the law still, that words of a testator intimating a request, wish or desire, are sufficient, when they are so plain and unequivocal as in this case, to create a trust, provided there be certainty of the gift and of the *object to be benefitted* (a). The authorities on this point are collected in a note to the case of *Harding v. Glyn*, 1 Atk. 469, and we find no modern decision conflicting with those cases to such an extent, as to create any difficulty in adhering to them, so far as this will is concerned.

Now if this point be as clear of doubt as I apprehend, the only other ground on which a question can be raised upon the will, taken by itself, is that instead of a sum of money or any thing specific, the will *directs* (for so I regard it), that the testator's daughter and residuary devisee shall make a *competent provision* for this appellant.

But we do not find that we should be warranted in holding that there is such an uncertainty here as must make the direction of no effect; the difference between such a direction and some that have been held too uncertain, such as were a testator directed "handsome gratuities" to be given to A. B. and C. D., is quite obvious. It is very common to direct, in wills, that a suitable maintenance shall be provided for, or a suitable education given, &c., to some object of the testator's bounty, and there is sufficient certainty in such directions to admit of their being carried into effect without a mere arbitrary exercise of authority on the part of the court. What may be *competent* under the circumstances, is matter of evidence, having all circumstances in view: if A. B. were to take an estate upon the consideration of making competent provision for the person conveying it, and were to give his bond or covenant to that effect, I conceive he would be liable in an action to pay such damages as a jury might assess, if he failed to make a provision. The undertaking would be sufficiently certain for a court of law to enforce, and not less sufficient for a court of equity,

(a) *Pushman v. Filleter*, 3 Ver. 71; 2 *Jarmin on Wills*, 533; 2 Eq. Cas. Abr. 479, Pl. 16; Vin. Abr. Change D. Pl. 15; 4 Russ. 376; 2 M. & Cr. 695; 5 Sim. 140; 10 Price, 130; 1 Ves. Jr. 208; 3 Ves. 8 2 S. & L. 189.

which acts on the conscience of the party, and upon a perfect investigation into all the circumstances.

In the case of *Abraham v. Alman*, 1 Russell, 511, though the court thought it could not give effect to the will, for reasons which, if clearly satisfactory, were peculiar to that case, yet I think it apparent, that such a direction as this will contains would not have been felt to create any difficulty. That case, indeed, and the case of *Broad v. Bevan*, cited in the note to it, are sufficient to show that upon the face of the will before us, if there were nothing else in the case, the appellant might well claim in a court of equity to have a competent provision decreed against the residuary devisee and legatee.

So far we agree in opinion with his Honour the Vice-Chancellor.

Upon the other point in the case we find ourselves constrained to differ. We do not consider that the gift of a competent provision, made by the will, is revoked by the second codicil. We look upon the gift of the town lot as cumulative, not as substituted in place of the other. This is a question proper to be decided upon the face of the will and codicils alone, as I apprehend; though there are to be found cases, in which regard seems to have been paid to the circumstances of the estate or other matters external, to aid in determining whether the latter bequest is to be taken as in place of the other, or in addition to it. If, however, the value of the town lot given by the codicil, or the circumstances of Mrs. Baby, could have been considered as material in deciding the question, there was no evidence on these points before the court, and the case is in fact left to turn upon the documents themselves. The general principal undoubtedly is, that the legacies, devises, &c., so given or made, are to be taken as intended to be in addition, and not that the last gift revokes the first; but the intention is to govern, wherever that can be discovered, as it often may. Accordingly, in the great multitude of cases of this description, which it would be tedious to refer to, the courts have held one way or the other, according to the indications which they thought the will afforded of the testator's intention; taking it for granted, as at the present day at least they do, that where there is no ground afforded for a contrary infe-

rence, the testator means that the legatee should take all that he has given.

Now, on the face of this will, I see nothing that we could rely upon as shewing the testator's intention, that because he had given to this niece (the appellant) a town lot, she was therefore not to have the competent provision which he had assigned to her by his will. He had given his other niece, Sarah, by his will, *a town lot*, in the first place ; then he gave her the interest of a certain promissory note, which might or might not produce her any thing in fact, upon which I should think the testator had some doubts, for by the first codicil he gives her 15*l.* a year in addition, which we may reasonably suppose he meant to be a barely competent provision, something that would keep her above want, but something which might be required for that purpose, notwithstanding his gift to her of a town lot. Then with regard to his other niece (this appellant), he takes up the subjects in an inverse order ; he first desires, by the will, that she shall have a competent provision, and then on the same day, in a codicil, gives her also a town lot. Both these objects of his bounty stand in the same relation to him. The town lots which he had given to each respectively, stand on the opposite sides of a street in the same town. In the absence of all means of judging by comparison, we cannot safely assume otherwise than that the lots were of a similar value ; and that the testator's nieces might require to have, and that the testator might reasonably intend they should have, a like degree of support from his estate. If so, then we should be disturbing his arrangements, by leaving with the one both the pecuniary provision, and the town lot, and compelling the other, because she got the town lot, to give up the pecuniary provision, though that, for all we know, might leave her without a competent maintenance or any thing approaching to it. We have no means of saying that the one is anything like an equivalent for the other. The testator has not declared that he intended it to be a substitution. It is argued that he has done so negatively at least, by inserting, in the case of the second gift to Sarah, the words "in addition to the bequests contained in my will," while he uses no such words when he gives the second gift

to the appellant. But besides that it has been decided, that the mere circumstance that such words are used in one part and not in used another of the same will, cannot be taken to be conclusive upon the point; it is to be considered that the additional bequests to the nieces are contained in distinct codicils, and though signed on the same day, they may not have been written by the same hand; they are attested by different witnesses. One person drawing such a codicil may have thought it well to insert the words in addition, from greater caution; another might be aware that it was unnecessary, for that the law would so hold if nothing to the contrary were said. In regard to the niece, Sarah, besides, the testator might imagine, if the town lot were of much less value than 25*l.* a year, that the giving her afterwards that annuity would be deemed a cancelling of the less valuable gift, and so that it would be safer, as he meant otherwise, to express it as in that codicil he does. But he could hardly have conceived that where he had by his will given any gift of a pecuniary nature to his niece, Mrs. Baby (such as his direction that she should be competently provided for), that the mere gift of the town lot, which may or may not have been worth 10*l.*, would cancel the other. It most clearly would not in any such case, and it could not seem reasonable to any testator that it should, unless indeed the land amounted to a competent provision, where we are not at liberty to assume, especially as the town lot is not devised to her in fee simple. And it was urged with reason, in the argument, that any inference that could be drawn from the inserting the words "in addition" in one codicil, and omitting them in the other, is at least neutralized by the circumstance that in the second codicil, which contains the gifts of the town lot to the appellant, the testator has expressly declared what part of his will he meant to revoke by that codicil, and does not revoke the direction in the will, appellant shall have a competent maintenance, while he does in terms revoke other provisions in his will; and in the body of the same codicil declares in express words that what he was thereby directing "should be annexed as a codicil to his will, and taking as part thereof," that is, as a part of the will as it will stand when those parts only are revoked which he in terms revokes, leaving the



unaltered parts and the codicils to be read together. On the whole, I should think the case afforded no room whatever for doubt, if it were not for the consideration which induced His Honour the Vice-Chancellor to dismiss the bill, namely, that the town lot devised by the second codicil, is so much taken from the residuary estate devised by the will to the daughter, out of which alone she could be called upon to make the provision; and that the appellant therefore cannot have both. No doubt in many cases that would be clearly the effect; and it might be evident upon the face of the will, that it would be unjust and absurd to hold otherwise; but this case, knowing no more of it than we do, does not stand before us as a case of this kind. It may or may not, for all that appears, be reasonable and consistent, that the daughter should afford a competent provision to the appellant, although the codicil has taken this town lot from her. If we were to hold that the two cannot stand together, then we must hold, that if the testator had, by the codicil, given the minutest portion of the real estate, or any trifling article of personal property, to the appellant, (for by the will the daughter takes the residue of both) she must give up all claim for maintenance. We do not find that the cases lay down any such principle in the abstract, and it would be extraordinary if they did, for it would generally run counter to the intention of the testator. If indeed it should turn out, when the proper inquiry comes to be made, that the town lot devised by the codicil, goes far towards supplying a competent provision; or that being taken away, it leaves so little with the residuary devisee, that she has not the adequate means which the will contemplates, of complying with the direction in that respect then we must suppose that upon the master's report, due allowance will be made for the facts as they shall appear; but on what is disclosed to us, we do not think that the codicil deprives the appellant of the claim to a competent provision under the will, in measuring which it would no doubt be right to take into account, what the town lot in question can properly be reckoned upon for supplying towards that purpose; a provision may be competent with it, which would not be competent without it; and the possession of that property, as well as the other circumstances of the

appellant, are to be taken into consideration ; for it is only a *competent* provision, all things of course considered, which the appellant can claim. The will and codicils are to be all read as forming the testator's will, and the effect of them is, to give certain gifts and benefits to others ; and to his daughter, what remains after his directions have been carried into effect.

Following the course taken by the court in the case of *Broad v. Beavan*, which I have referred to, we are of opinion that the decree which has been made should be reversed, and that we should declare that the appellant is entitled by the will to a competent provision, to be made out of the estate devised to Jane Miller ; that the master shall inquire and report upon the condition of the appellant, and the circumstances of the estate, as was done in that case, with a view to such order being made in favour of the appellant, as His Honour on the master's report shall find to be most just and convenient in reference to all the facts of the case.

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### IN THE EXECUTIVE COUNCIL.

(*Before the Hon, J. B. Robinson, Chief Justice; the Hon. J. B. Macaulay, Ex. C.; and the Hon. H. J. Boulton, Ex. C.*)

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THE 25TH, 26TH AND 28TH AUGUST, 1847.

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ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

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*Between* JOHN TORRANCE AND WILLIAM LUNN...*Appellants.*

AND

ROBERT PILKINGTON CROOKS AND

OTHERS.....*Respondents.*

### PRACTICE—SUPPLEMENTAL ANSWER.

A bill having been filed against trustees and executors residing at Montreal in the province of Lower Canada, for an account of the estate of their testator, who at the time of his death, and for some years previously, had been domiciled there ; the trustees, &c., although not obliged to do so, had appeared to, and answered the bill, submitting to account, &c., in such manner as the court should direct. Afterwards, and before any evidence had been taken, they discovered that there was a very important difference as to the responsibility incurred by them according to the laws of Upper Canada, and what they would have incurred according to the laws of Lower Canada, but which at the time of filing their answer, they were not aware did exist ; they then moved the court, upon affidavits

setting forth these facts, to be allowed to file a supplemental answer, for the purpose of stating the fact of foreign domicile, and the law of Lower Canada, according to which alone they had always acted. Held: That under the circumstances, they ought to be allowed to file a supplemental answer, for the purpose of placing these facts upon the pleadings; and held also, that although the effect of such permission might be to enable the parties to set up a defence of the want of jurisdiction in the courts of this province, to interfere in the subject matter of the suit, still that that was not any objection against it, but rather a reason why they should be permitted to file the supplemental answer.

*Nanton and Mowat*, for the appellants.

*Esten*, for the respondents.

*Nanton*, in reply.

The nature of the case, the arguments of counsel, and the authorities cited, sufficiently appear in the judgment of the court.

ROBINSON, C. J.—The appellants complain of an order of his Honour the Vice-Chancellor, rescinding an order which he had before made, giving leave to the appellants and John McKenzie, who was a defendant with them in the court below, to file a supplemental answer for the purpose of introducing upon the pleadings certain facts, in order to shew that the transactions, through which they are sought to be charged, took place chiefly in Lower Canada, where the appellants were and are domiciled, and where the testator whom they represent also was domiciled at the time of his death; and that they are, under the circumstances, only liable to be charged according to the laws of that country; and that in point of fact, those laws differ materially, in regard to the subject matter of this suit, from the laws of Upper Canada.

The effect of the Vice-Chancellor rescinding the order which he had once granted, and which had been drawn up and passed, but not entered, is to deny to the appellants an opportunity of thus amending their answer.

The appeal does not turn upon any question of jurisdiction, but the subject could not fail to be adverted to upon the argument, and it was more or less discussed by the learned counsel on both sides.

We must suppose the respondents to assume, that on some ground or other the Court of Chancery in Upper Canada can exercise jurisdiction and give relief in all the matters of which they have complained, and so far as the cause has

gone, the appellants have seemed not unwilling to concede that they may, and they have seemed to content themselves with maintaining, that in regard to their execution of the trust committed to them by their testator, the courts here, in proceeding to controul them, must apply the law of Lower Canada, upon the principle of *lex loci*.

Without desiring to travel out of the subject matter of this appeal, I wish to be understood, that on whatever principles it may have been assumed that the Court of Chancery of Upper Canada, can exercise a jurisdiction in regard to all the matters stated in the bill, I am not of the opinion that the standing orders of the court, which were referred to in the argument (the 63d and 164th I think) can at all affect the question. The whole object of those orders evidently is, to afford facility in bringing absent parties before the court, to answer in those cases over which the court can legally claim jurisdiction. It is not pretended by such orders to extend the jurisdiction of the court to any objects over which its control would not otherwise rightfully extend.

It could not have been designed to give them that effect; and if it had been, that end, it is plain, could not have been attained by them.

If the jurisdiction had been called in question, or if the pleadings were such as necessarily to bring the point under the view of the court, then I conceive the decision of it would not have been affected by those orders, which could cloarly not confer any new or enlarged jurisdiction. As the pleadings in their present shape do not state the case in such a manner as to call upon us to consider the question of jurisdiction, I shall say no more at this time upon it.

With regard to the point of practice raised by the appeal, I am of opinion that the first impression of His Honour the Vice-Chancellor was the correct one, and that he could and ought to have allowed the supplemental answer to be filed.

It is objected as one reason against it, that it would in effect be opening a way to the party to except to the jurisdiction, after he has acquiesced in it. But if that effect could follow, it would, I think, be no reason against it, but the contrary, in a case such as this is stated to be in the appellants' affidavits. When a party withdraws himself and



his property from the country in which he has had transactions and incurred liabilities, and takes up his residence in England, we know the grounds upon which the courts of equity there, having him within their jurisdiction and taking upon themselves *agree in personam*, compel him to do what good conscience requires. If they did not in such cases take cognizance of equitable claims transitory in their nature, there would frequently be no remedy, for the party may have left his own country expressly for the purpose of evading his liabilities.

Without stopping to enquire into the distinctions which have been established as to the extent of the jurisdiction which may be so assumed, it is obvious that in cases of that nature, and in cases where the existence of peculiar local jurisdiction, in England, may occasion difficulty, the interests of justice are concerned in holding persons strictly to the necessity of excepting at the proper time, and in the proper manner; and if they do not, then to regard them as having waived all question, by their acquiescence.

But the proposed supplemental answer states a case of a different kind; and the question of jurisdiction, which, upon some points, at least, of the respondents' case, and the proposed answer, would seem capable of being raised, would be, whether the court is not asked to interfere, without any pretence whatever, in a matter of wholly foreign jurisdiction, not merely as regards the subject matter, but as regards the persons whom the court is desired to control.

I refer now particularly to that part of the bill which prays relief, as it is sworn in the affidavits, against persons who have been always, and are now, domiciled in Lower Canada, and prays relief against them in regard to an administration committed to them by the proper authority of that country, and exercised there upon assets within Lower Canada, and in execution of a will made there, and by a testator domiciled there at the time of his death.

Now, without saying whether such statements do or do not certainly shew a case in which the Court of Chancery of Upper Canada has no pretence for interfering, it is clear, I think, that there is nothing which a court of justice would more scrupulously avoid, than meddling in any case, of which

it could truly be said, that all they might assume to do in it must be *coram non judice*.

They would be helping no one effectively by such an interference, but might be creating confusion and difficulty, and no court would suffer itself to be driven with its eyes open into such a course; and it is therefore in my opinion no objection to the amendment which is asked, that it may lead to the ascertainment of such facts as might bring the jurisdiction in question; for if it is surmised that there is really an objection of this vital kind to the court's interfering, the sooner it is brought into light and disposed of the better.

In *Penn v. Lord Baltimore* (1 Ves. 446), Lord Hardwicke observes, "a court of equity, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of equity appears." Upon this point of jurisdiction, I refer to *Roberdeau v. Rous*, Atk. 543; *Lord Cranstown v. Johnston*, 3 Ves. Jr. 182.

I may be in error in this view of the subject, but I certainly consider that any doubts of such a nature as have been suggested respecting the jurisdiction, instead of being arguments against allowing the supplemental answer, should rather have weighed with the court to grant it, in order that it might see its true position in regard to jurisdiction without delay; and we ought, I think, to lean towards facilitating the placing upon the record the alleged facts in that respect, so that they may be proved or disproved in an open and formal manner.

With regard to the propriety of allowing the supplemental answer under the circumstances, I think both reason and authority are strongly in support of it.

The case has been very ably argued on both sides, and all the decisions cited that the industry of counsel could discover. The current of authority seems to me consistent in favour of allowing the supplemental answer, for the purpose for which it is desired here.

It is not the case of a defendant seeking to retract an admission, or to depart from a statement which he has made, and to substitute another for it, when it might be doubtful whether the first statement or the second was the true one.

The application is not only before the hearing, but before evidence taken.

The fact of foreign domicile, and the fact of what the law of Lower Canada is in regard to the rights and duties of executors, are neither of them points in which there is the slightest reason for apprehending that the appellants can deal unfairly with the respondents, or the court, in whatever statement they may make.

No one can read the pleadings as they stand, without feeling satisfied what the fact really is, in regard to the domicile of the testator, and of these appellants.

The extracts of correspondence spread out on the bill, and the various statements in it, shew plainly enough to the apprehension of any man, that the testator was living in Montreal for many years, and carrying on large business there up to the time of his death, and it is just as plain that the appellants have been also all domiciled there continuously.

There can be no imposition designed or attempted in respect to either point ; it is no questionable fact that these defendants wish to place upon the record, the truth of which may be known only to themselves, or which they have it in their power to distort or give a false appearance to. And as regards the law of Lower Canada, there can be no misleading by the appellants on that point.

In this respect, this case before us differs from those in which the courts have refused the amendment. The cases of *Tidswell v. Bowyer*, 7 Sim. 64 ; *Hewes v. Hewes*, 4 Sim. 1 ; *Nail v. Pointer*, 4 Sim. 482 ; *Bell v. Dunmore*, 7 Beav. 283 ; *Doyley v. Crump*, 1 Dick. 35 ; *Fulton v. Gilmour*, 9 Jurist, 1 ; confirmed on appeal (1845, p. 265) ; *Swallow v. Day*, 9 Jur. 805. ; *Moggridge v. Hodgson*, 2 Anst. 443 ; *Frankland v. Overend*, 9 Sim. 365, all tend to support the application, the last mentioned case strongly, because it was after rule to pass publication, and the defendant had admitted the plaintiff's case in a point which, by ordinary diligence in enquiry, he could readily and certainly have ascertained, and yet he was allowed to amend his answer, and deny what he had admitted.

I have looked into all the cases referred to, and I have found nothing in addition to them worth citing.

I consider this case stronger in favour of the application than most of them.

The cases relied on upon the other side, do not seem to me to be any of them such as should lead us to say, that the application should have been refused ; a reason for refusing is obvious in all of them, such as could not be truly urged here.

In *McDougall v. Furrier*, 4 Russ, 486, the court refused the amendment, but it was at a much later stage of the proceedings. I conclude that the suit bound no greater interest than the right to the tithes for the term in respect to which they were claimed. If it could, it would have seemed more consistent with justice to have allowed the amendment, but it was a fair matter for the exercise of the Chancellor's discretion under the circumstances.

*Wells v. Wood*, 10 Ves. 401 ; there the amendment was refused, but the defendant wished to admit a fact he had denied, and he did not satisfactorily shew why he had made the former misstatement. The Lord Chancellor, however, stated the question to be always "one for the discretion of the court in the particular case."

*Greenwood v. Atkinson*, 4 Sim. 54, where it was also refused, affords no argument against the amendment here, but the contrary ; and the same, I think, may be said of *Spurrier v. Fitzgerald*, 6 Ves. 554 ; and of *Curling v. the Marquis of Townsend*, 19 Ves. 628.

The latter case was much relied on by the respondents, but it was decided partly because the defendant did not shew precisely what he desired to insert in the supplemental answer : his object, besides, was to retract admissions deliberately made ; and the court gave as another reason, that the amendment could not materially alter what the court would do in the case.

*Nevison v. Stables*, 4 Russ. 210, when carefully examined, affords no ground for refusing this application. It was after final decree, and the party petitioned for a rehearing, which the Chancellor said could only upon that evidence result in the same decree that had been made. If he could have any redress in that case, it could only be by a bill in the nature of a bill of review, for the purpose of admitting new facts.



The principles and purposes for which courts of law will allow parties to alter their pleadings, are in the main adhered to in courts of equity, and what was desired in *Nevison v. Stables*, would under corresponding circumstances be denied at law.

But at law, before trial, and while no evidence has been heard, great facility is allowed to parties so to shape their pleadings as to attain the ends of justice in regard to the substantial points in the cause.

The case of *Nuber v. Stein*, 4 Moore & Scott, 328, cited by Mr. Nanton, is a proof of this, and the language of Lord Chief Justice Tindal has a strong bearing here.

In courts of equity, from the peculiar nature of the proceeding, the object being to allow a party in the cause to vary his own statements on oath, there will frequently occur reasons for caution which would not apply in regard to amendments in the common law courts, but where there is no room under the circumstances for suspicion, the object in all the courts must be the same,—to advance the ends of justice by allowing the case to rest on its real merits, and to be decided on its true grounds.

I have looked carefully into the late case of *Fulton v. Gilmour*, 1 Phillips, 527, cited by the respondents, and find nothing in it that has a strong bearing in their favour. The amendment there was allowed. The practice on this point was examined at some length, and authorities compared and considered.

The case, I think, on the whole, supports the amendment here, and is certainly not an authority to be relied on as decisive on the other side.

I do not indeed see how it could be expected, that a final decree could be made in this case without reference to the law of Lower Canada, and to the fact of foreign domicile, sufficiently apparent on the record (though not formally and precisely brought out) to call for attention and enquiry, unless we are to be reckless as to the bounds of our jurisdiction, and indifferent to the obligation incumbent upon the court to apply the right rule of law according to the facts of the case.

I refer to the case of *Pottinger v. Wightman*, 3 Mer. 67,

as shewing with what scrupulous care courts of equity feel it proper to proceed, in directing inquiry into such facts as are indispensable to be ascertained before they can be satisfied of the grounds on which they are to act. *Parker v. Whitly*, 1 T. & R. 372, and *McCall v. McCall*, 2 C. & L. 184, are in point to shew, when taken in connection with the statements in these pleadings, that it must be incumbent upon the court to see all doubts cleared up as to what rule of law is to be applied by them in deciding between these parties.

The bill discloses plainly enough to common understanding, that the appellants are attempted to be called to account here in respect to a trust committed to them and executed by them in a foreign country, from which they have never departed, and to the laws of which they are amenable.

If that fact were at all doubtful upon the pleadings, it is fit it should be ascertained, or the court must be acting in the dark.

It has not been questioned that an appeal lies from such an order as this, though it is upon an application to amend, which in general is discretionary with the court, and is admitted to be clearly so in England in this particular instance.

It is against the general principle, to admit of appeals from the discretion of one judge or court to the discretion of another; but some of the cases cited shew that appeals have been entertained in England from orders made on applications of this nature, and we may safely assume the right of appeal to be at least as clear here.

I do not find, on a comparison of the answer as it now stands with the draft of the supplemental answer, that it is desired to introduce anything more than seems necessary for fixing attention to the alleged facts of foreign domicile of the testator and of the appellants, and of the justice and necessity of applying the *lex loci*, which is averred to be different from the law of this province.

It was urged that in the supplemental answer, the appellants would endeavour to excuse themselves under the law of Lower Canada for neglects and omissions which in their original answer they have denied, but I do not find that to be so when the two are closely compared.

On the whole, I think there are important and strong reasons for allowing the amendment, and I can see no objection against it. Under corresponding circumstances in a court of law, it would in such a stage of the cause be allowed at once.

There are many cases, and among them some of the most recent, in which the defendant has been allowed the indulgence when the circumstances were stronger against it; and I see none in which it has been refused, unless on some ground that does not exist here.

These appellants have applied in an early stage of the proceedings; they are not asking to be allowed to withdraw any admission made by them, or to deny any former statement, or to depart from any line of defence which they had set up, or to place on the record anything inconsistent with what is now stated there.

What they wish to place formally and distinctly on the record, is no matter of which a knowledge is confined to their own breasts, and upon which they can intend or expect to mislead the court by false information, or disingenuous concealment. And the points which the amendment would bring distinctly into view, are only points on which the court for its own sake would find it necessary (as I conceive) to see that all doubt was removed, before they could venture to make a final decree.

Let us suppose that the case had gone, as it stands upon the bill and answer, to the hearing, and that it had been clearly made out, that the appellants have employed in their own business large sums of money of the estate, for which they admit themselves to be under the circumstances accountable with interest; and suppose that the rate of interest in Lower Canada had been much higher than that of this province, or much lower, can we avoid seeing that the Vice-Chancellor would at once have had to determine according to which rate of interest the appellants should account, and that it would be inconsistent with the internal evidence in the bill as to the scene of these transactions, if he had assumed that it was according to the legal interest of Upper Canada that it should be computed? Can we say that the Vice-Chancellor could have felt clear in giving such

a direction? and yet this point of the rate of interest might be a very minor consideration, compared with some that might present themselves upon the hearing, and which ought to be disposed of on a proper application of the principle of *lex loci*, even admitting that all should proceed without any inevitable necessity arising for looking into the question of jurisdiction.

It is plain to me, that what these appellants ask for, is nothing more than is most desirable should be granted on public grounds affecting the court, and with a view to preparing the way for a right determination of the case.

I am therefore of opinion, that the order appealed from should be reversed, and that the appellants should be allowed to file a supplemental answer, as they had been permitted to do by the second order, upon the terms of paying the costs which may be occasioned by the amendments, and the costs of the application.

MACAULAY, Ex. C., concurred in the judgment given by the Chief Justice.

BOULTON, Ex. C.—Not being aware that judgment would be particularly desired to-day, I have not come prepared to express any decided opinion upon the case; but as the Chief Justice is ready to deliver his judgment (in which Mr. Justice Macaulay coincides), I do not wish judgment postponed on my account.

I entertain no doubt but that the law of Lower Canada is the rule by which the executors, who reside in that part of the province, and where the testator lived and died, and where the chief part of the estate was to be administered, must be held to account; and the only point about which I entertain a doubt is, the mode of introducing that law to the notice of the court below. What the law of Lower Canada is, as applicable to the taking the accounts in this case, is a matter of fact to be made out in evidence; and it appears to me that it may be more conveniently done by a reference to the Master than to make it a question at the hearing. The defendants in the court below, might certainly have set up the domicile of the testator by their answers; but even then the law of that domicile would have been the subject of



examination in the Master's office, to govern the facts to be developed there, and to form the subject of his report.

In *Pottinger v. Wightman*, 3 Mer. 67, the decree directed an inquiry before the master, both as to the domicile of the intestate and as to the law of Guernsey, where he was said to have lived and died. In *McCall v. McCall*, 2 Con. & Laws., a similar inquiry was directed, at the suggestion of the court. I do not mean to say, that upon further deliberation I might not have concurred in the opinion expressed by the Chief Justice, and acquiesced in by Mr. Justice Macaulay; at present, however, I incline to the opinion, that all that is sought for by the supplemental answer might as well be obtained by a reference to the master under the decree, and with less expense.

With regard to jurisdiction: As the defendants have chosen to appear, the court have, doubtless, full power to proceed to a final adjudication: how it can be enforced, if the parties to be acted upon are really resident in Lower Canada, beyond the jurisdiction of the court below, is another question, not now under consideration. Had the defendants refused to appear, I doubt very much the power of the Vice-Chancellor to have enforced their appearance.

With regard to the general jurisdiction of the Court of Chancery over matters arising abroad, it may safely be laid down that the principle upon which it rests, consists in its power of coercing or restraining the parties residing within its jurisdiction claiming interest in such foreign transactions. If the parties submit themselves to the jurisdiction of the court, by appearing to its process, they may undoubtedly be directed by the court as to the manner in which they shall deal with matters in which they are interested abroad. The subject is clearly, and I think most satisfactorily though shortly treated, in *Lord Portarlington v. Souilly*, 3 Milne & Keene, 104.

In this case, the parties, having appeared, may be directed to account for the estate of the testator, although everything connected with it may have taken place in Lower Canada. In taking such account, the laws of Lower Canada must doubtless be the rule to guide the judgment of the court here. If, after having appeared, the defendants are no

longer found in Upper Canada, no process from Chancery can affect them or their property abroad; and should they possess none here liable to sequestration, the decree will be abortive. If found here, the parties may be imprisoned until they comply with the behests of the court.

*Esten* then asked for the costs of the appeal, as the granting permission to file a supplemental answer was a matter of indulgence on the part of the court; and whether or not the defendants in the court below would be allowed to avail themselves of the supplemental answer, for the purpose of raising any question as to the jurisdiction, they having in their original answer submitted to act as the court shall direct, and by their supplemental answer an attempt is made to do away with that submission and plead to the jurisdiction. The court reserved the consideration of the question of costs, and the following note on both points has since the argument been made by his Lordship the Chief Justice.

A discussion arose upon the course which it might be reasonable to take with regard to the costs of the appeal, the respondents' counsel suggesting that their costs of the appeal should under the circumstances be also paid as a condition of obtaining the order. The court said they had no objection to reserve the point for further consideration, but they did not think they could properly vary from the general course with regard to costs, when the decree or order appealed from is reversed.

That the court were not now granting an indulgence as upon the first application for it, but were affording relief against an order taking away the indulgence after it had been granted, and as the court now think, properly granted. The respondents, it may be reasonably said, ought to have submitted to the order which the Vice-Chancellor had made. Their creating a new discussion about it was unnecessary, and it would be unreasonable to throw the respondents' costs of the appeal upon the appellants who had succeeded in the appeal.

*Mr. Esten*, on behalf of the respondents, requested that the court would intimate whether the appellants would be allowed to make use of the amendment for the purpose of

raising any exception to the jurisdiction which they could not have taken upon the pleadings as they before stood.

*Per Cur.*—We cannot anticipate what course the parties may imagine to be opened to them by the amendment, nor what the court may think it right to do upon the pleadings as they will then stand, either in consequence of any question upon the point of jurisdiction that may be raised by the parties, or of their own suggestion.

The effect will be to place on record the facts of foreign domicile, and of the particular law of Lower Canada, and they will stand then as if they had been so stated in the original answer, though the original answer will remain on the files unaltered, according to the modern practice.

The appellants have not asked for the amendment for any other purpose than to open the way to them for contending that they are entitled to have the law of Lower Canada applied to the question, whether they have duly administered to the estate or not.

If, however, they should hereafter object that the court has no jurisdiction over the case, and if it would be an answer to such objection, that they have voluntarily appeared and answered in the suit, and thus submitted to the jurisdiction (supposing the fact to be so), then that answer to the objection would seem to be as available to the plaintiffs below after the supplemental answer as before. And however that may be, the facts of foreign domicile, and of the peculiar law of Lower Canada, if it does differ from that of Upper Canada in the particulars alleged, are too indispensable to the right adjudication of the case, to be left out of view.

# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN THE

### KING'S BENCH AND PRACTICE COURTS,

FROM TRINITY TERM, 1 AND 2 WILLIAM IV.,  
TO TRINITY TERM, 2 AND 3 WILL. IV.

#### ABATEMENT.

Replication to a plea in abatement for nonjoinder of defendants is not double, because it answers the plea as to the two persons who the plea states ought to have been joined singly, giving a separate reason as to the nonjoinder of each. Plea in abatement bad, under the provincial statute respecting joint obligors and contractors, for not stating expressly that the joint obligor or contractor was, at the time of plea pleaded, living at some place within the jurisdiction of the court; but it is not necessary in a plea in abatement for nonjoinder, to state that the joint obligor or contractor was alive within the jurisdiction of the court at the time of action brought.—Yuell v. Harvey, 249—215 B.

#### ABSCONDING DEBTOR.

On motion for an attachment, under the statute 2 Will. IV., ch. 5, which was refused, there being but one person swearing beside the creditor applying. In giving judgment the Chief Justice said, I hope the profession generally will understand,

that the safest rule in framing these affidavits will be, to follow as closely as possible those relating to common affidavits of debt.—Anonymous, 326—292 B.

Where the person swearing to the departure or concealment of a debtor, residing at a distance from his place of abode, they should state in their affidavits the grounds of their belief.—Bank U.C. v. Spafford, 407—373B

#### APPEAL.

The court will not allow the revival of a judgment by an administrator pending an appeal to the court of the Governor in Council, or the King and Privy Council, although it be suggested and proved by affidavit, that the administrator has been informed and believes the plaintiff in the court below, in whose favour the judgment was given, died after the judgment and before the allowance of appeal.—Washburn, administrator, v. Powell, 497—463 B.

#### ARBITRATION.

A reference of a cause to arbitration, by order of Nisi Prius, may be



revoked by either party at any time before award made.—Burrell v. Mills, 292—209 B.

Where it is awarded, that one party shall pay money and the other shall deliver up premises on the same day, in an action for the money, it is sufficient to aver a readiness to deliver the premises and *vice versa*; and where to a plea, that the defendant demanded the award from the arbitrator on 5th February, the plaintiff replied, a publication and notice of award on the 6th (the day when the award was to be made), the replication was held good.—Baker v. Booth, 407—373 B.

### ARREST.

*Affidavit of debt*]. It is not necessary in an affidavit of debt for money due for money lent, paid, &c., and upon an account stated, to state what parts of the aggregate sum stated to be due were upon each of the items or divisions; the general rule is, that the court will not receive counter affidavits to an affidavit of debt, and will not balance probabilities or try the merits on affidavit, with a view to the discharge of the defendant, yet when a debt appears clearly and manifestly not to be due, the court will discharge defendant on common bail.—Tannahill v. Mosier, 483—449 B.

*Second Arrest*]. The court set aside an arrest and bail bond, the plaintiff having had the defendant arrested before for the same cause of action, and having been non-prossed thereon for not declaring.—McCague v. Meighan et al., 550—516 B.

### ATTACHMENT.

Form of writ against estate and effects.—Meighan et al. v. Pinder, 326—292 B.

### ATTORNEY.

Where a bill was filed against an

attorney in term, but the copy and demand of plea were delivered in vacation, and the plaintiff signed interlocutory judgment and assessed damages before the succeeding term, the court held the proceedings irregular.—Frazer v. Boulton, 244—210 B.

The court will not hold the defendant to terms accepted by his attorney, at the suggestion of a judge at chambers, when he immediately abandons the judge's order.—Young v. Shore, 348—314 B.

### BAIL.

*Bail Piece*]. This court will set aside a recognizance roll not warranted by the proceedings, after *comperuit ad diem* pleaded to an action on the bail bond.—McDonnell v. Ruttan, 374—340 B.

*Relief*]. The court will not extend the time to bail to surrender their principal, further than is directed by the rule 1st Anne. Bail are absolutely fixed, after eight days have elapsed in full term from the return of process against themselves.—McPherson et al. v. Bail of Mosier, 525—491 B.

*Ca. Sa.*]. It is not a good ground for setting aside or staying proceedings on *fi. fa.* against bill, "that the *ca. sa.* against the principal has not "been filed."—Hugill v. McCarthy et al., 529—495 B.

*Justification*]. Affidavit of justification cannot be sworn before the defendant's attorney.—Koyle v. Wilcox, 113—113 A.

### BAIL BOND.

*Alias Writ*]. When a defendant was arrested on an alias writ under 2 Geo IV., ch. 1, after having entered an appearance to serviceable process, and given a bail bond to the sheriff, the bail bond was set aside with costs.—Douglas v. Powell, 253—219 B.

*Staying proceedings*]. The court

will stay proceedings on a bail bond, where a delay of three years has taken place after the arrest, without any proceeding on the part of the plaintiff.—*Young v. Shore*, 348—314 B.

## BANKRUPTCY.

See *INSOLVENCY*.

## BARON AND FEME.

A deed of bargain and sale purporting to convey the real estate of a *feme covert*, in which the husband is not named as a party, but only in the description of the *feme*, is not effectual under the provincial statutes enabling married women to depart with their real estates, although signed and sealed by the husband: vide 43 Geo. III., ch. 5; 50 Geo. III., ch. 3.—*Doe ex. dem. Bradt v. Hodgkins*, 247—213 B.

## BOND.

To debt on bond for 400*l.*, setting out condition and assigning breaches, the defendant cravedoyer and demurred, and the plaintiff had judgment, and entered judgment for the amount of the penalty and costs, and issued execution without going to a jury. The defendant having moved to set aside the proceedings, the plaintiff had leave to amend by striking out the final and entering an interlocutory judgment, and entering an award of *venire* to assess those damages and enquire of further breaches, although three years had elapsed since entry of judgment.—*Douglas v. Powell*, 87—87 A.

A several obligor is a competent witness in an action against a co-obligor, to prove the cancelling the obligation by tearing off the seal of the co-obligor.

An action of trover may be maintained against the obligor in a bond for securing the fidelity of a clerk, the obligor having torn off his seal

(and this although the bond might be considered as still subsisting and sufficient to sustain an action of debt), and damages may be recovered against the obligor to the amount of the penalty.

A bond may be given up to be cancelled by the president and directors of a banking corporation without the appointment of an attorney.—*President, Directors & Co. of the B. U. C. v. Widmer*, 256—222 B.

## BOND TO THE LIMITS.

A bond, with a condition that a person should confine himself to the limits of the Johnston District gaol, and should not depart from the same without payment, &c., &c., (the person not being confined in the gaol, nor within the limits at the time of the bond given), void by 23 Henry VI., ch. 9. Where the condition of a bond is set out onoyer, and it appears on the record by that means that the bond is within the stat. 8 & 9 Will. and Mary, ch. 11, the plaintiff ought to suggest his breaches before trial.—*Campbell, Executor, v. Lemon*, 435—401 B.

To debt on a bond to the limits by the sheriff's assignee, it is a good plea, that after breach and before the assignment to the plaintiff, the sheriff delivered up the bond to the debtor to be cancelled, but it is no answer that the debtor was surrendered after breach, if the bond were not cancelled.—*LeMesurier v. Smith*, 513—479 B.

## CERTIORARI.

A judgment for the *defendant* against the *plaintiff* cannot be removed from a district court into the King's Bench, under the 19 Geo. III., ch. 70, sec. 4.—*Gregory v. Flannigan*, 552—518 B.

## COGNOVIT.

The court refused to discharge a defendant arrested after giving a

cognovit, and before the time until which the execution was stayed had expired.

N.B. There was no process issued previous to the cognovit, and the affidavit of debt was not entitled.—Walton v. Hayward, 502—468 B.

### CONTRACT.

*Rescission of*]. Brown v. West, 675—47 c.

### COSTS.

*Special Jury*]. The costs of a special jury are costs in the cause and not costs of the day.—Whitehead v. Brown, 379—345 B.

### COURT OF CHANCERY.

*See* MORTGAGE.

### CROWN LANDS.

Where the executive government have examined into and considered the claims of opposing parties to lands leased from the crown, with a claim of pre-emption, and have ultimately granted them to one of those parties, the Court of Chancery has not any authority, where no fraud appears in obtaining the grant, afterwards to declare the grantee of the crown a trustee of any portion of such lands for the opposing party on the ground that he had previously acquired interest therein; and *quare*, if even there had been fraud, whether the court, under such circumstances, would have authority to interfere at the instance of the party?—Boulton v. Jeffrey, 702—74 c.

### DAMAGES.

Trespass lies for the sale of a property seized as a distress, and allowed to lay on the premises more than five days after the seizure, not being in the custody of the bailiff, but the full value of the property cannot be recovered.—Thompson v. Marsh et al., 389—355 B.

### DEED.

*Registry*]. A deed must be considered fraudulent and void against a conveyance subsequently executed, where the former is not registered and the latter is, notwithstanding the first deed has been obtained by artifice and fraud from the first vendee and so the registry prevented.—Doe Nellis v. Matlock, 521—487 B.

### DEVISE.

The words in a will, “I have already ready given to my son John lot “No. 1,” do not constitute a devise.—Doe Smith v. Meyers, 335—301 B.

### DISTRESS.

A distress may be made for rent for a sum certain, payable in produce at the market price, and such distress may be sold.—Thompson v. Marsh et al., 389—355 B.

### EJECTMENT.

*Landlord*]. Where A. defended, as landlord in ejectment, against a purchaser at sheriff's sale of an expired crown lease sold as belonging to B. by assignment. *Held*, that after proof of an exemplification of the lease, the judgment, *fieri facias* and sheriff's deed, a notice to produce the original lease and assignment, without specifying particulars, or shewing them ever to have been in A.'s possession, was sufficient to have let in secondary evidence of the assignment to B., and that as A. shewed no title, nor that he had ever been in possession, the same presumptions should be made in favour of the purchaser as if he had been left to contend with the debtor himself.—Doe McGuire v. Dennis, 623—589 B.

Judgment cannot be entered against the casual ejector until four days have elapsed from the time the rule for judgment *nisi* is taken out



of the office.—Doe ex. dem. Harley v. Roe, 113—113 A.

*Crown lease*.] A., lessee of the crown verbally assigned his lease to B., who paid him for it, and went into possession of the land in the lease, and after some years died in possession, having received the original lease from A. A. afterwards died, and the plaintiff, his administrator, brought an action of ejectment against the defendant, B.'s administrator; at the trial the plaintiff put in an exemplification of original lease and letters of administration, and the defendant having proved as above, and that after B.'s death the lease and other papers had been taken out of B.'s trunk, and the plaintiff had since stated it was in his possession, and proof of notice to produce the lease (which was not done), and the plaintiff produced it after the defendant's case closed, and the jury found for the defendant. *Held*, on motion for new trial, the jury were justified in presuming legal assignment of the lease under the circumstances.—Doe Murphy v. Mulholland, 115—115 A.

*Consent Rule*.] The court will under special circumstances, allow a consent rule in ejectment to be entered without an express admission of the premises mentioned in the declaration, or an admission of being in possession of them.—Doe ex dem. Canada Company v. Roe, 242—209 B

## EQUITY OF REDEMPTION.

See MORTGAGE.

## ESTOPPEL.

*Estoppel*.] A nominee of the crown, before the issuing of letters patent, makes a conveyance in fee to one person. He afterwards obtains a patent granting the estate to himself, and then conveys to another, who again conveys. *Held*, that the patentee of the crown, and his assigns as privies

in estate, are estopped by the first conveyance; and that the patent feeds the estoppel and makes it a vested interest and estate. *Also, Held*, that the Register Act does not apply, unless when a memorial of a conveyance of the same land has been previously registered.—Doe Hennessy v. Myers, 458—424 B.

## EVIDENCE.

The court will receive parol evidence to rectify a written instrument, notwithstanding the language used was that intended by the parties, where the legal effect of such language is different from what was the intention and agreement of the parties.—Meritt v. Ives, 25—25 A.

## EXECUTION.

A writ of *fi. fa. against lands*, bearing *teste* after the death of the defendant, is void.—McCarthy v. Low, 377—353 R.

## EXECUTOR AND ADMINISTRATOR.

*Plene Administravit*.] An executor is estopped to plead *plene administravit* to a declaration on *sci. fa.* to revive a judgment against himself, and the nature of such judgment appearing on the face of the declaration, the plan is bad on demurrer.—Wood, Administrator v. Leeming, 542—508 B.

*Assets*.] Lands are assets for the satisfaction of debts in the hands of an executor under 5 Geo. II., ch. 7, and to a plea of *plene administravit*, the plaintiff may reply lands. Gardiner v. Gardiner, 554—520 B.

## FOREIGN LAW.

A bill having been filed against trustees and executors residing at Montreal, in the province of Lower Canada, for an account of the estate of their testator, who, at the time of his death, and for some years pre-



viously, had been domiciled there; the trustees, &c., although not obliged to do so, had appeared to and answered the bill, submitting to account, &c., in such manner as the court should direct. Afterwards, and before any evidence had been taken, they discovered that there was a very important difference as to the responsibility incurred by them according to the laws of Upper Canada and what they would have incurred according to the laws of Lower Canada, but which, at the time of filing their answer, they were not aware did exist; they then moved the court, upon affidavits setting forth these facts, to be allowed to file a supplemental answer, for the purpose of stating the fact of foreign domicile, and the law of Lower Canada, according to which alone they had always acted. *Held*, that, under the circumstances, they ought to be allowed to file a supplemental answer for the purpose of placing these facts upon the pleadings; and *held*, also, that, although the effect of such permission might be to enable the parties to set up a defence of the want of jurisdiction in the courts of this province, to interfere in the subject matter of the suit, still that was not any objection against it, but rather a reason why they should be permitted to file the supplemental answer.—*Torrance v. Crooks*, 740—111 c.

### GRANT.

The description in a patent will be taken as correct, unless proved to be wrong by the clearest testimony.—*Doe Smith v. Meyers*, 335—301 B.

### GUARANTEE.

Declaration in assumpsit on a guarantee in the following form: "Please credit A. 100%, and I agree to hold myself responsible for the

"payment of the same," and averment that plaintiff did credit A. *Held*, that plaintiff must under the general issue prove such averment, and that calling a clerk, who stated that such credit had been given, because he saw it entered in plaintiff's books, which were not produced, and which entry he had not made himself, was not sufficient to prove it. *Quere*. Whether such an undertaking is within the Statute of Frauds?—*Parker v. Duteher*, 106—106 A.

### HIGHWAY.

Where, in the original plan of a township, a piece of ground was laid out as a highway, which was subsequently granted by the crown in fee to several individuals, and was occupied by them and others claiming from them for upwards of thirty years, and never had been used as a highway: *Held*, that an indictment for a nuisance for stopping up that piece of ground, claiming it as a highway, could not be sustained.—*Rex v. Hon. Wm. Allan, Hon. P. McGill, and S. P. Jarvis, Esq.*, 90—90 A.

### INJUNCTION.

*Lease, construction of*]. Assignee of lease or part thereof, entitled *pro tanto* to benefit of covenant for a renewal and customary right of pre-emption.—*McVean v. Woodell*, 33—33 A.

Injunction being prayed for in the prayer for process is sufficient.—*Clark v. Manners*, 1—1 A.

On issuing injunction to stay proceedings at common law, money found due by verdict or award must be paid into Court.—*Clark v. Manners*, 4—4 A.

### INSOLVENCY.

An act of bankruptcy must be stated in affidavits filed with judge.—*Re Gillespie*, 2—2 A.

The examination of the bankrupt in a case where the original creditor is dead, is received in evidence—but is not entitled to the same degree of credit as if offered in evidence in the creditor's lifetime—adding a specific sum to an amount loaned, which is payable upon a contingency, and which contingency is settled between the parties to be a risk worth five per cent. on the debt due, and charging interest and also five per cent. on the amount so added to the sum loaned, is usury. *Quere*, whether the Court of Bankruptcy has power to order void securities to be delivered up to be cancelled.—Street *ex parte*, In re Richardson, 129—129 A.

Party becoming bankrupt will not prevent his being arrested for contempt in not obeying order of this court.—Brewer v. Rose, 6—6 A.

### INSOLVENT DEBTOR.

Affidavits may be received, contradictory of the answers of a prisoner in execution, to interrogatories filed to deprive him of the weekly allowance, and in answer to an application for his discharge. And the court will not discharge the prisoner, unless they *are satisfied* that he has no means of support, and has not fraudulently secreted or conveyed, &c.—Montgomery v. Robinet, 540—506 B.

### JUDGMENT.

*Bar.*] A judgment recovered for a defect in pleading, and not on the merits, is no bar to another action.—Baker v. Booth, 407—373 B.

*Lien.*] A judgment is not a lien upon land for the purpose of an *elegit*, to prevent the effect of a *fieri facias*, under 5 Geo. II., ch. 7, sued out upon a judgment subsequently entered, the *fieri facias* being in the sheriff's hands before the *elegit*.—Doe Henderson v. Burtch, 548—514 B.

### JURISDICTION.

An action may be maintained for words imputing perjury committed in Lower Canada.—Malloch v. Graham, 375—34I B.

### LANDS.

*Semble*, a person claiming lands under a sheriff's deed, sold at the suit of an alien, is entitled to recover in ejectment, notwithstanding 5 Geo. II., ch. 7, it being necessary to take the objection of alienage, if available at all, before execution executed.—Doe Richardson v. Dickson, 326—292 B.

Lands are assets for the satisfaction of debts in the hands of an executor, under 5 Geo. II., ch. 7, and to a plea of *plene administravit*, the plaintiff may reply lands.—Gardiner v. Gardiner, administratrix, 554—520B.

### LEASE.

A distress may be made for rent for a certain sum reserved in a lease, payable in produce at a market price.—Thompson v. Marsh et al., 389—355 B.

### MORTGAGE.

Bill by judgment, creditor to redeem prior mortgages, and foreclose subsequent purchaser with notice.—Bloor & Eastwood v. Bank of U. C., et. al., 31—31 A.

The Court of Chancery, under the eleventh section of the Chancery Act, may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession.—Simpson v. Smyth, 629—1 c.

*Held*, by all the court, that an equity of redemption of an estate of inheritance *cannot* be sold by the sheriff under a common law process.—Simpson et al. v. Smyth et al., 178—145 B.

A purchaser at sheriff's sale of lands sold on a judgment and execution subsequent to a mortgagee by the debtor in fee, cannot recover against the mortgagee in possession.—Doe Richardson v. Dickson, 326—292 B.

### NEW TRIAL.

Where, in trespass for taking staves, the plaintiff recovered 20% where the law on some of the facts which were improperly elicited at the trial was doubtful, but it appeared that the plaintiff was entitled to receive something in that form of action, and the residue in another form, a new trial was refused, although a tender could have been pleaded to the amount of the whole claim, if the action had been brought in another form.—Ballard v. Ransom & Jackson, 70—70 A.

*Semble*, on motion for a new trial after argument, the court will allow a new ground to be taken by the party moving, if the justice of the case require it.—Vary v. Muirhead, 121—121 A.

The court will not set aside non-suit granted at the trial, the witness for the plaintiff being absent, the action being against magistrates acting in the execution of their offices.—Stinson v. Scollick et al., 251—217 B.

The court will not set aside a verdict for the plaintiff where the justice of the case appears strongly with him, merely because there was at the trial a preponderating weight of evidence on the part of the defendant in support of a plea of the Statute of Limitations.—McMillan v. Fairfield, 527—493 B.

### PENAL STATUTE.

A penal statute is to be construed according to its spirit, and the rules

of natural justice, not according to its very letter.—Rex v. McIntosh, 531—497 B.

### PLEADING.

*Assault and Battery*]. To trespass for assault and battery, and wounding plaintiff and biting off his fingers, and common assault against two defendants, the general issue was pleaded by both jointly, but they severed in their pleas of justification; first plea by one defendant, *molliter manus imposuit* to preserve the peace, plaintiff and the other defendant being fighting. To first count, first plea the same, and plaintiff disturbing family, &c. Plea by another defendant to first count, *son assault demense*. Special demurrer to all the pleas, that defendant had jointly negatived the assault and battery, and by their pleas they attempted to justify the same separately. Special causes overruled, but first and second pleas bad, *moliter manus imposuit* being no answer to the declaration, and fourth plea good as an answer; if there was any excess the plaintiff should have new assigned.—Shore v. Shore et al., 65—65 A.

*Demurrer*]. A plaintiff cannot regularly confess his replication bad on demurrer, and enter a judgment for the defendant as to the pleas replied to thereby; but if such pleas be, by reason of the other issues, unimportant as to the plaintiff's right to recover, judgment need not be given on demurrer.—Rochleau v. Bidwell, 353—319 B.

*Statute of Limitations*]. A replication in an action of assumpsit to a plea of the Statute of Limitations, setting out that the defendant was sheriff, and that the amount was a surplus remaining in his hands of money levied under a *fi. fa.*, held bad although the plaintiff might have



avoided the statute by declaring in case, setting out the circumstances specially.—Ruggles, admx., v. Beikie, 404—370 B.

### PRACTICE.

*Order to Dismiss*]. A defendant is entitled to an order to dismiss the plaintiff's bill notwithstanding the death of a co-defendant.—Hall v. Green, 42—42 A.

*Term's Notice*]. Where no proceedings had been taken in a cause for four terms, the court set aside an assessment of damages for want of a term's notice.—Beker v. Garrett, 245—211 B.

*Serving Declaration*]. A declaration cannot be regularly delivered before common bail filed or appearance entered; and the irregularity is not cured by an attorney accepting the declaration, without denying that he is attorney for defendant.—Baldard v. Wright, 252—218 B.

*Appearance*]. Where a declaration was served on an attorney, who had not appeared, and no appearance was entered for the defendant at all, but the attorney did not deny that he was acting for the defendant, and the plaintiff afterwards signed interlocutory judgment, the court set aside the proceedings without costs, but stated that they would on application make the attorney pay them.—Dobie v. McFarlane, 319—285 B.

*The same*]. When one of two defendants was arrested, and the other served with process, and an application was made to set aside the arrest, which was not proceeded with, and the plaintiff entered an appearance for both defendants, as on serviceable process, and filed and served declaration, and signed interlocutory judgment, the proceedings were set aside for irregularity.—Kauntz v. Cameron et al., 254—220 B.

*Demurrer. — Interlocutory Judgment*]. A plaintiff cannot treat a special demurrer as a nullity, and sign judgment for want of a plea, though the demurrer may appear frivolous.—Soper v. Draper et al., 323—289 B.

*Amendment*]. Where a general verdict has been returned for the plaintiff on several counts, one of which is bad, but it appears the plaintiff elected to proceed on a good count at the trial, the court will allow the verdict to be amended after motion in arrest of judgment without costs.—Gouldrich v. McDougall, 246—212 B.

Where the evidence at the trial was applicable to a good count only, and a general verdict, the court allowed of an amendment without costs, by entering the verdict on the good count, after a motion made in arrest of judgment.—Beasley v. Darling et ux., 240—212 B.

The court will amend a *postea* by the judge's notes, and amend a judgment by the *postea after an appeal allowed*, and reasons of appeal assigned, the verdict having been taken generally for the plaintiff on points reserved, and the *postea* being framed as if the general issue only had been pleaded, without noticing several other issues on special pleas of the Statute of Frauds.—Rochleau v. Bidwell, 353—319 B.

*Declaration*]. A declaration filed before a return of the writ, and the affidavit of service filed, is a nullity, as well as a declaration filed more than a year after process is returnable.—Forrester v. Graham, 403—369 B.

### PROCESS.

See MORTGAGE.

### RIDEAU CANAL.

A contractor or workman entering  
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upon land to quarry stone under the Rideau Canal Act, gains no property in the stone by severing it from the freehold; when it is quarried it belongs to the crown, or if the crown do not take it, to the owner of the land, and therefore an assignment by the workman who quarries the stone is void.—*Mittleberger v. By.* 379—345 B.

### REGISTRY.

The Register Act does not apply, unless when a memorial of a conveyance of the same land has been previously registered.—*Doe Hennessy v. Myers*, 458—414 B.

### SHERIFF.

Where a sheriff returned *cepi corpus*, and was ruled to bring in the body, and attached for not obeying the rule, and the attachment was set aside for irregularity, and while it was in existence the defendant in the action had been discharged by supersedeas bail having been put in, but the rule of allowance was not served. *Held*, that a second attachment against the sheriff, on a second rule to bring in the body, issued eight months after the setting aside of the first attachment and the debtor's discharge, was irregular, and the court ordered it to be set aside.—*Rex v. Sheriff of Niagara*, 126—126 A.

### SPECIFIC PERFORMANCE.

*Bill for*].—*Shaw v. Burrell*, 20—20 A.

### TAXES.

A stranger may pay taxes on land without the consent of the owner at the time, and a redemption by a stranger before the year is out after the sale, is sufficient to prevent the forfeiture, though done without the knowledge of the owner. The time of the redemption excludes the day on which the sale takes place, and

the expression "from the time" may be held as either inclusive or exclusive of the day, according to the context in the statute, and the bearing and object of its provisions.

If the treasurer certify a redemption improperly, he is liable, and not the sheriff refusing to make a conveyance.—*Boulton v. Ruttan*, 396—362 B.

### TRUST AND TRUSTEES.

#### See CROWN LANDS.

### VARIANCE.

In case for malicious prosecution declaration stated trial before the Hon. L. P. Sherwood and A. Macdonell, assigned by his Majesty's letters patent, to them and others named therein directed, and the record put in evidence was of trial before the Hon. L. P. Sherwood and others, his fellow-justices, assigned by letters patent directed to him and others, and any two of them, of whom he was to be one. *Held*, no variance.—*Prentice v. Hamilton*, 114—114 A.

Immaterial averments need not be proved, and variances in the statement of a libel, not altering the sense of the part truly set out, are immaterial.—*Hamilton v. Burwell*, 339—305 B.

### WILL.

*Construction of*]. A testator, by his will, gave the residue of his real and personal property to his daughter, the lands to be held by her in fee tail, and in a subsequent part of the will adds: "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. Baby, at Hamilton." By a codicil, executed on the same day as the will, after making certain alterations in his will, he adds: "And I do hereby devise to my niece, Mrs. Baby, of Hamilton, the lot containing one-fifth

of an acre, fronting on School-street, in the town of Kingston." *Held*, first, affirming the decision of his Honour the Vice Chancellor, that the words "I wish and desire" were not precatory merely, but directory, and formed a charge upon the residu-

ary estate; and *held*, secondly, reversing the judgment of his Honour that the devise in the codicil of the town lot in Kingston was cumulative and not substitutional.—*Baby v. Miller et al.*, 730—101 c.

















